SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 150

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER,

vs.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 18, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

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IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF COLUMBIA

Filed May 27, 1953

No. 68-53

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH,
Appellant,

VERSUS

HAROLD E. TALBOTT, Secretary of the Air Force, *Appellee.*

Rule for Petition for Writ of Habeas Corpus

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA:

The Relator, Audrey M. Toth, above-named, respectfully represents:

1. That she is the sister of Robert W. Toth and resides at 210 Dunseith Street, Pittsburgh, Pennsylvania.

2. That Robert W. Toth is now illegally under arrest, restraint, detained and deprived of his liberty by the above-named Respondent in a stockade at Taegu, Korea.

3. That said unlawful arrest, restraint and detention of the said Robert W. Toth by Respondent purports, as Relator is informed and believes, to be under and pursuant to Article 3(a) of the Uniform Code of Military Justice, effective 31 May, 1951.

4. That the Respondent alleges that on the night of September 27, 1952, premeditated murder, conspiracy to commit murder, and aggrevated assault were committed against th person of one Bang Swoon Kil, a citizen of South Korea, and that the said Robert W. Toth may have been involved in the commission of the aforesaid offenses. Since his seizure and arrest, the said Robert W. Toth has declared in writing that he is not guilty of committing the said crimes.

5. That the said Robert W. Toth was honorably discharged from the Air Force of the United States of America

on December 8, 1952, having theretofore been awarded the Bronz Star for bravery beyond the call of duty.

77 6. That subsequent to his discharge from the Air Force, the said Robert W. Toth became gainfully employed as a steel-worker in the City of Pittsburgh, Pennsylvania, and was so employed on May 13, 1953, at which time he was secretly arrested by military authorities and spirited away by airplane to Korea to face possible trial on the afore-mentioned charges.

7. That the aforesaid seizure, arrest and abduction of the said Robert W. Toth was in violation of the rights guaranteed to him by the Fourth and Fifth Amendments of the Constitution of the United States of Aemrica, in that he was deprived of "due process of law" and of other fundamental rights inherent in our American system of government.

8. That being a civilian and entitled to the legal rights of a person in that status, the said seizure and arrest of the said Robert M. Toth was in violation of Rule 5 and Rule 40 of the Federal Rules of Criminal Procedure, in that the arresting officers failed to obey the following mandatory requirements thereof:

a. The person making an arrest with or without a warrant is required to take the person before the nearest available Commissioner or before any other nearby officer in power to commit persons charged with offenses against the laws of the United States. (The place where the said Robert W. Toth was seized and apprehended is almost within walking distance of the District Court for the Western District of Pennsylvania, and two United States Commissioners with offices in the same building.)

b. In failing to file a complaint before either of the said United States Commissioners or any of the local District Judges.

c. In failing to have a Commissioner inform the defendant of the complaint, if any there was, against him.

d. In failing to have a Commissioner inform the defendand of his right to retain counsel.

4. In failing to have a Commissioner inform the
78 defendant of his right to have a preliminary examination or hearing.

f. In failing to have a Commissioner inform the said Robert W. Toth that he was not required to make a statement and that any statement made by him could be used against him.

g. In failing to allow the said Robert W. Toth the opportunity to consult counsel, or to even telephone counsel that he was being forcefully taken out of the jurisdiction.

9. That the constitutional rights of the said Robert W. Toth were further violated by the failure of the arresting officers to comply with the procedure set forth in Rule 40 of the Federal Rules of Criminal Procedure. Said Rule was specifically intended to prevent the kidnapping or removal of a defendant out of the jurisdiction in which he resides without a preliminary hearing.

10. That in seizing and arresting the said Robert W. Toth in the manner aforesaid, the Respondent failed to comply with Rule 40 (2) in that neither a Commissioner nor a Judge informed the defendant of the charge or charges against him, of his right to retain counsel, and of his right to have a hearing or to waive a hearing by signing a waiver before a Commissioner or Judge. The requirements outlined in Rule 40 (a), (b), (1), (2), (3), and (4) were in existence and on the statute books when the Uniform Code of Military Justice was passed in 1951, and consequently the remedies afforded to civilians by virtue of such rules were known to framers of the Code and were not repealed by it, expressly or by implication.

11. That the protection afforded by Rules 5 and 40 as aforesaid was a codification of previous decisions of the United States Supreme Court and spelled out the requisites that must be present if due process of law is to be afforded citizens answerable to the criminal laws of the United States.

12. That the said Uniform Code of Military Justice
79 of 1951, as applied to persons not on active duty in the military service (herein referred to as "civil-

(92)

15

CHARGE SHEET

PLACE Hq., 75th Air Depot Wing, APO 970, c/o Postmaster, San Francisco, California		DATE 8 April 1953
ACCUSED (Last name, First name, Middle initial) (List aliases when material.) [redacted], Robert W.	SERVICE NUMBER AF 13 313 080	RANK OR GRADE Civilian, formerly Airman First Class
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) 220 Dunseith Street Pittsburgh, Pennsylvania A civilian subject to the Uniform Code of Military Justice under Article 3a.	DATE OF BIRTH CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 126h (2))	PAY PER MONTH BASIC $ SEA OR FOREIGN DUTY $ TOTAL $

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE	TERM OF CURRENT SERVICE
Honorably Discharged 8 December 1952	

PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.)

DATA AS TO WITNESSES

NAME OF WITNESS	ADDRESS	WITNESSES FOR PROSECUTION	WITNESSES FOR ACCUSED
Edward G. Pumphrey, 1st Lt AO 2 215 516	2nd Material Recovery Squadron, K-2 APO 970	X	
Raymond F. Middleman, M/Sgt AF 13 125 060	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Eugene L. Rumpff, 3/Sgt AF 27 892 864	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Rodolfo Renteria, Jr., A/2C AF 19 385 999	543d Ammunition Supply Squadron Depot 75th Air Depot Wing, APO 970	X	
Frank R. Zappulla, A/3C AF 11 211 729	3450 Technical Training Wing Francis E. Warren AFB, Wyo.	X	
Pyun Dong Il, Dr.	ROK 1050, Wae Dong, Pusan	X	
Eddie L. Mullins, A/2C AF 18 313 828	3320th Air Police Sq, Amarillo AFB, Texas	X	
Kenneth G. Stoops, A/B AF 15 296 995	3301st Medical Group, Barksdale AFB, La.	X	
[illegible]	[illegible]	X	

Raymond F. Middleman, M/Sgt AF 13 125 060	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Eugene L. Rumpff, 3/Sgt AF 27 892 864	543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970	X	
Rodolfo Renteria, Jr., A/2C AF 19 385 999	543d Ammunition Supply Squadron Depot 75th Air Depot Wing, APO 970	X	
Frank R. Zappulla, A/3C AF 11 211 729	3450 Technical Training Wing Francis E. Warren AFB, Wyo.	X	
Pyun Dong Il, Dr.	ROK 1050, Wae Dong, Pusan	X	
Eddie L. Mullins, A/2C AF 18 313 828	3320th Air Police Sq, Amarillo AFB, Texas	X	
Kenneth G. Stoops, A/B AF 15 296 995	3301st Medical Group, Barksdale AFB, La.	X	
William F. Marolock, A/2C AF 14 376 109	1100th Air Police Sq, Bolling AFB, Wash 25, D.C.	X	

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE. IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND.

Photographs of Korean male, Bae Seom Kil. OSI (IG) Hq USAF, Wash D.C.

Death Certificate of Bae Seom Kil, Korean male. Retained at District Office #8, OSI (IG) FEAF, APO 970.

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION
None		

ians''), and particularly Section 3(a) thereof, is unconstitutional, being contrary to the Fourth and Fifth Amendments of the Constitution of the United States, and other fundamental rights traditionally recognized since the Constitution of the United States with its Amendments was originally drafted.

13. That the said Act, particularly Section 3(a) thereof, is vague, indefinite, arbitrary, capricious and sets up no procedural standards for a fair and impartial hearing to a defendant, all of which is contrary to the due process clause of the United States Constitution.

14. That the unprecedented action of the Respondent in seizing and abducting the said Robert W. Toth, through the Military Police at the Greater Pittsburgh Airport, is without precedent in the annuals of military justice.

15. That to allow a military tribunal to try a civilian for offenses allegedly committed prior to his discharge from the armed forces would thereby vest in military personnel the statutory right to put civilians on trial for their life and liberty, all of which in the past has led to military tyranny and has been declared unconstitutional and in violation of the due process clause of the United States Constitution.

16. That even assuming the validity of the Code of Military Justice, your Relator is advised and therefore avers that there is no justification for secret arrest and seizure, and such action on the part of governmental officials has never been condoned by your Honorable Court.

17. That if the said Act of 1951, particularly Section 3(a) thereof and other sections relating to civilians is declared constitutional, it would provide a military tribunal with continuing jurisdiction in violation of the constitutional and natural rights of the citizens of the United States.

18. Your Relator believes it is proper to say that the afore-described seizure and arrest of the said Robert W. Toth was strikingly similar to the operations of the
80 secret police in those unfortunate countries where civilians are taken away by night never to return

or to be heard from again. The power of the military authorities over some 19,000,000 veterans will be supreme and avove the civil law if the judicial branch of this government permits them the constitutional right to exercise jurisdiction over discharged ex-servicemen.

19. Your Relator is advised and therefore avers that there is no jurisdiction to try by a military Courts-martial the said Robert W. Toth in South Korea, and the Respondent is without any jurisdiction to try the said Robert W. Toth for any offense committed prior to December 8, 1952.

20. Your Relator is advised and therefore avers that a person discharged from the Air Force before a commencement of a Court-martial prosecution against him cannot thereafter be tried before the Courts-martial for crimes committed while he was in active service.

21. That the proposed Courts-martial is without jurisdiction to try him for the reason that at the time of his seizure and arrest he was not a member of the armed forces on active duty.

22. That jurisdiction, if ever acquired, is now void because the said Robert W. Toth has been deprived of his constitutional rights to due process of law.

23. Your Relator is advised and therefore avers that a person separated from the armed services ceases to be amenable to military jurisdiction.

24. That said Article 3(a) is so vague and indefinite that it is insufficiently precise to endow it with the force of law.

25. Your Relator is advised and avers that if any of the aforementioned violations were committed by the said Robert W. Toth, the Republic of South Korea has sole jurisdiction to try him for the said offenses.

81 WHEREFORE, your Relator prays your Honorable Court that a Rule be granted upon Harold E. Talbott, Secretary of the Air Force, Department of National Defense, to show cause, if any he has, why the said Robert W. Toth should not be released and discharged from his present detention and returned to this country for the pur-

pose of according him such constitutional rights as are guaranteed by the United States Constitution. All proceedings including pre-trial investigation of Charges and Specifications, if any have been filed, and the Courts-martial trial itself to be stayed pending disposition of this Rule.

/s/ AUDREY M. TOTH

/s/ ANTHONY R. MCGRATH
2404 Grant Bldg.
Pittsburgh 19, Pa.

/s/ AL. PHILIP KANE
Kane & Koons
1331 G St., N. W.
Washington 5, D. C.
Attorneys for Petitioner

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82 AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY, } ss:

Before me, the undersigned authority, personally appeared AUDREY M. TOTH, who being duly sworn according to law, deposes and says that she is the petitioner in the foregoing Petition; that she is authorized to and does make this Affidavit; that all the facts herein stated of her own knowledge are true and the facts stated upon information received from others, she believes to be true, and all of them she expects to be able to prove at the trial of this cause.

/s/ AUDREY M. TOTH

Sworn to and subscribed before me
this 25th day of May, 1953.
/s/ JAMES F. SMITH

83 [Filed May 27, 1953 Harry M. Hull, Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner,*

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent.*

Order Directing Respondent to Show Cause

It is this 27th day of May, 1953, ORDERED that the petition be filed without prepayment of costs.

IT IS FURTHER ORDERED that the respondent either in person or by counsel appear in the Court on or before the Tenth day after service of a copy of this order and of the petition upon him and make return to said petition and show cause, if any he has why the Writ of Habeas Corpus should not issue.

IT IS FURTHER ORDERED that the respondent serve on the petitioner by mail a copy of his answer to this rule.

/s/ JAS. W. MORRIS
Judge

84 Filed June 4, 1953

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner,*

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent.*

Return and Answer to Rule to Show Cause

Comes now the respondent, Harold E. Talbott, Secretary of the Air Force, upon whom has been served an

order to show cause why a writ of *habeas corpus* should not issue for the production of Robert W. Toth, and by his attorney, Leo A. Rover, United States Attorney in and for the District of Columbia, makes the following return to the said order and respectfully shows that he holds the said Robert W. Toth by authority of the United States as a person subject to military jurisdiction and amenable to trial by court-martial under Article 3(a) of the Uniform Code of Military Justice (50 U. S. C. 553(a)) under the following circumstances:

I

That on April 8, 1953 an officer of the 75th Air Depot Wing, Far East Air Logistic Force, signed court-martial charges, under oath, charging the said Robert W. Toth with the premeditated murder of a male Korean national on or about September 27, 1952, in violation of Article 118 of the Uniform Code of Military Justice (50 U. S. C. 712), and with conspiracy to commit murder on or about September 27, 1952, in violation of Article 81 of the Uniform Code of Military Justice (50 U. S. C. 675). That on or about September 27, 1952, the said Robert W. Toth was an Airman First Class, United States Air Force, assigned to
the 543d Aviation Squadron Supply Depot, 75th
85 Air Depot Wing, APO 970. That the said Robert
W. Toth was honorably discharged from the United States Air Force on December 8, 1952. An authenticated copy of the original court-martial charges is appended hereto.

II

That on April 30, 1953, in accordance with Article 3(a) of the Uniform Code of Military Justice (50 U. S. C. 553(a)) and paragraph 11b of the Manual for Courts-Martial, United States, 1951 (16 FR 1308) the Acting Secretary of the Air Force consented to the apprehension, return to Korea, and trial by court-martial of the said Robert W. Toth, and directed the Air Provost Marshal, United States Air Force, to effect the apprehension of the said Robert

W. Toth and cause him to be delivered forthwith to the Commanding General, Fifth Air Force: That accordingly, on May 13, 1953, at Pittsburgh, Pennsylvania the said Robert W. Toth was lawfully apprehended pursuant to Article 7(b) of the Uniform Code of Military Justice (50 U. S. C. 561(b)). That on May 18, 1953, the said Robert W. Toth was delivered to the Commanding General, Fifth Air Force, an overseas command of the United States Air Force, and is now confined in the Air Force Correction Center, Republic of Korea. An authenticated copy of the original letter of the Acting Secretary of the Air Force, dated April 30, 1953, is appended hereto.

III

That the offenses allegedly committed by the said Robert W. Toth were thoroughly investigated by the United States Air Force prior to the apprehension of the said Robert W. Toth. That the disposition of the charges against the said Robert W. Toth is and will be in all respects pursuant to military law. That a thorough and impartial investigation will be conducted in the presence of the said
86 Robert W. Toth in accordance with the provisions of Article 32 of the Uniform Code of Military Justice (50 U. S. C. 603), and paragraph 34 of the Manual for Courts-Martial, United States, 1951 (16 FR 1316) before any final determination as to the disposition of the charges will be made by the officer exercising court-martial jurisdiction. That the said Robert W. Toth will be advised of his right to be represented at such investigation by counsel. That upon his request he will be represented at the investigation by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction. That at such investigation the said Robert W. Toth will be afforded full opportunitly to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the officer appointed to conduct such investiga-

tion will examine available witnesses requested by the said Robert W. Toth. That upon completion of such investigation a copy of a statement of the substance of the testimony taken on both sides will be furnished the said Robert W. Toth.

IV

That after completion of the investigation in accordance with the provisions of Article 32 of the Uniform Code of Military Justice (50 U. S. C. 603), and paragraph 34 of the Manual for Courts-Martial, United States, 1951 (16 FR 1316), the officer exercising general court-martial jurisdiction will refer the charges to his staff judge advocate for consideration and advice. That in accordance with the provisions of Article 34 of the Uniform Code of Military Justice (50 U. S. C. 605), the officer exercising general court-martial jurisdiction will not refer the charges to a court-martial for trial unless he has found that the charges are warranted by the evidence indicated in the report of investigation.

87

V

That in the event the charges are referred to a court-martial for trial, the said Robert W. Toth will be represented, in accordance with Article 38 of the Uniform Code of Military Justice (50 U. S. C. 613), by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction. That in the event the said Robert W. Toth chooses to be represented by counsel appointed by the officer exercising general court-martial jurisdiction, such counsel, in accordance with Article 27, Uniform Code of Military Justice (50 U. S. C. 591), as implemented by the policy of the United States Air Force, must be a member of the bar of a Federal court or of the highest court of a State, and must be certified as competent to perform duties as defense counsel by The Judge Advocate General of the United States Air Force.

VI

That in the event the said Robert W. Toth is found guilty and sentenced by a court-martial, the record of trial will be reviewed as required by the provisions of Part IX of the Uniform Code of Military Justice (50 U. S. C. 646-663).

VII

That on March 11, 1953 the said Robert W. Toth voluntarily accompanied an agent of the Office of Special Investigations of the United States Air Force to the agent's Pittsburgh Detachment Office. That at such office the agent read and explained to the said Robert W. Toth his
88 right under Article 31(b) of the Uniform Code of Military Justice (50 U. S. C. 602(b)) not to make any statement concerning the offenses being investigated, and advised him that any statement made by him could be used as evidence against him in a trial by court-martial. That the said Robert W. Toth was also informed of the nature of the matter being investigated. That after the said Robert W. Toth had been so advised he stated that he had knowledge of the matter under investigation; that he refused to answer any other questions and gave as his reason therefor that by answering he might incriminate himself. That the said Robert W. Toth further stated that the matter under investigation had occurred while he was in the military service and that since he is now a civilian he does not wish to revive it. That the said Robert W. Toth also stated that as far as he is concerned it was a past issue and that he had forgotten it.

VIII

That the apprehension of the said Robert W. Toth is lawful under the provisions of Articles 3(a) and 7(b) of the Uniform Code of Military Justice (50 U. S. C. 553(a) and 561(b)); that the offenses which he is charged with having committed while in a status in which he was subject to the Uniform Code of Military Justice (50 U. S. C. 551-

741) are each punishable by confinement of five years or more; that he cannot be tried for such offenses in the courts of the United States or any State or Territory thereof or of the District of Columbia. That the procedures in the courts of the United States and before United States Commissioners in criminal proceedings do not apply in this case. That sole court-martial jurisdiction exists over the said Robert W. Toth to try him for the offenses involved in this case. That court-martial jurisdiction over the said Robert W. Toth now exists in this case notwithstanding his discharge or separation from a military status.
89 That this case presents no constitutional question.

IX

That the said Robert W. Toth cannot be tried for the offenses involved in this case by the Republic of Korea.

X

That by *habeas corpus* the civil courts may exercise no supervisory or correcting power over the proceedings of a court-martial. That the single inquiry, the test, is jurisdiction. That a resort to *habeas corpus* prior to the exhaustion of the remedies provided by Part IX of the Uniform Code of Military Justice (50 U. S. C. 646-663) is inappropriate and premature.

XI

Respondent denies each and every allegation contained in the petition for a writ of *habeas corpus*, except the allegations contained in paragraph one thereof, and except as are hereinbefore specifically admitted, modified, or explained.

(93) 16

Charge I: Violation of the Uniform Code of Military Justice, Article 118

Specification: In that Robert W. Toth, a civilian subject to the Uniform Code of Military Justice under Article 3a, then an Airman First Class, United States Air Force, assigned to the 543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970, did, at or near K-9 Air Base, APO 970, on or about 27 September 1952, with premeditation, murder Bang Soon Kil, a male Korean national, by means of shooting him with a rifle.

Charge II: Violation of the Uniform Code of Military Justice, Article 81

Specification: In that Robert W. Toth, a civilian subject to the Uniform Code of Military Justice under Article 3a, then an Airman First Class, United States Air Force, assigned to the 543d Ammunition Supply Squadron Depot, 75th Air Depot Wing, APO 970, did, at or near K-9 Air Base, APO 970, on or about 27 September 1952, conspire with First Lieutenant (then Second Lieutenant) George C. Schreiber, Staff Sergeant Kenneth A. Borchardt and Airman First Class Thomas L. Kinder, to commit an offense under the Uniform Code of Military Justice, to wit: premeditated murder of Bang Soon Kil, a male Korean national, and in order to effect the object of the conspiracy, Airman First Class Thomas L. Kinder did shoot the said Bang Soon Kil with a rifle.

If this space is insufficient for all charges and specifications, they will be set forth numerically, front to back, on separate sheets attached to this page.

SIGNATURE OF ACCUSER	RANK	ORGANIZATION
Herman E. Hurst HERMAN E. HURST	Colonel, USAF	Hq 75th Air Depot Wing

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 8th day of April, 1953, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

Ben Taylor
BEN TAYLOR
SIGNATURE

Lt Colonel, USAF, Hq 75th Air Depot Wing
RANK AND ORGANIZATION OF OFFICER ADMINISTERING OATH

Adjutant
OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. SEE PARAGRAPH 29e, MCM, 1951, AND ARTICLES 30a AND 136.

Officer administering oath must be a commissioned officer.

_____ DATE

I have this date informed the accused of the charges against him.

_____ SIGNATURE

_____ RANK AND ORGANIZATION

Headquarters, 75th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif, 8 April 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1630 hours, this date.

FOR THE COMMANDING [1] OFFICER:

Ben Taylor
Ben Taylor, Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

I have this date informed the accused of the charges against him.

_____ SIGNATURE

_____ RANK AND ORGANIZATION

Headquarters, 75th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif, 8 April 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1630 hours, this date.

FOR THE COMMANDING [1] OFFICER:

Ben Taylor
Ben Taylor, Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

_____ DESIGNATION OF COMMAND OF CONVENING AUTHORITY — PLACE — DATE

Referred for trial to the _____ court-martial appointed by _____

_____, _____ 19__, subject to the following instructions: [2] _____

BY [1] _____ of _____
COMMAND OR ORDER

_____
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

I have served a copy hereof on each of the above-named accused, this _____ day of _____, 19__.

_____ SIGNATURE

_____ RANK AND ORGANIZATION OF TRIAL COUNSEL

[1] When an appropriate commander signs personally, inapplicable words are stricken out. [2] Relative to proper instructions which may be included in the indorsement of reference for trial, see par. 33j(1), MCM, 1951. If none, so state.

to the code and for which he cannot be tried in the Courts of the United States or any State or Territory thereof or the District of Columbia; court-martial jurisdiction of the United States Air Force having not terminated under Article 3(a) of the Uniform Code of Military Justice; 50 U. S. C. Section 553(a); by the discharge of the said Robert W. Toth on 8 December 1952, I am satisfied that there is probable cause to believe that murder and conspiracy to commit murder was committed as alleged.

97 2. Pursuant to paragraph 11b, Manual for Courts-Martial, 1951, (Executive Order 10214, February 8, 1951), Article 3a of the Uniform Code of Military Justice, as the Secretary of the Air Force, I hereby consent to the apprehension, return to Korea, and trial by court-martial of the said Robert W. Toth.

3. I hereby direct the Air Provost Marshal, United States Air Force to offset the apprehension of the said Robert W. Toth, presently residing at 220 Dunseith Street, Pittsburgh, Pennsylvania and cause him to be delivered forthwith to the Commanding General, Fifth Air Force, to answer the said court-martial charges.

1 Incl.

charge sheet

JAMES H. DOUGLAS
Acting Secretary

XII

Wherefor, the respondent respectfully prays this Court that the order to show cause be discharged and that the petition for a writ of *habeas corpus* be dismissed.

LEO A. ROVER
United States Attorney

EDWARD O. FENNELL
Assistant United States Attorney
Counsel for Respondent

CHESTER W. WILSON
Lieutenant Colonel, USAF
Office of The Judge Advocate
General, USAF
Washington, D. C.
Of Counsel

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90 CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RETURN AND ANSWER TO RULE TO SHOW CAUSE was mailed to Al. Philip Kane, Esquire, attorney for the petitioner, at his address, 1331 G Street, N. W., Washington 5, D. C., this ..... day of June 1953.

EDWARD O. FENNELL
Assistant United States Attorney

91 Filed June 4, 1953

Accompanying Papers to Return and Answer Of Respondent Talbott

UNITED STATES OF AMERICA
DEPARTMENT OF THE AIR FORCE

Washington, D. C. May 29, 1953
(Place) (Date)

I HEREBY CERTIFY that the attached are photostatic copies of the original charges in the court-martial case of Robert W. Toth, civilian (formerly Airman First Class, AF 13 313 030), and of letter of the Acting Secretary of the Air Force consenting to the apprehension, return to Korea, and trial by court-martial of said Robert W. Toth, and directing the Air Provost Marshal, United States Air Force, to effect the apprehension of the said Robert W. Toth and cause him to be delivered forthwith to the Commanding General, Fifth Air Force, the originals of the attached copies being on file in the Office of The Judge Advocate General, United States Air Force.

S/ REGINALD C. HARMON
Major General, USAF
The Judge Advocate General,
United States Air Force

I HEREBY CERTIFY that Major General Reginald C. Harmon, who signed the foregoing certificate, is the Judge Advocate General, United States Air Force, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, HAROLD E. TALBOTT, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 29th day of May, 1953.

(Seal)

HAROLD E. TALBOTT
Secretary of the Air Force
By PHILIP J. CURRAN
Administrative Assistant.

Filed July 2, 1953

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

H. C. No. 68-53

ROBERT W. TOTH, *Plaintiff*,

v.

HAROLD E. TALBOTT, *Defendant*.

Washington, D. C.,
Thursday, June 25, 1953.

Re: Petition for Writ of Habeas Corpus

Opinion of the Court

* * * * * * * * * *

23 The Court: Very well. You concede jurisdiction, then?

Mr. Bennell: Yes, Your Honor.

The Court: Very well.

* * * * * * * * * *

35 This case involves some novel questions under the new Code of Military Justice. There is presented to the Court a petition for a writ of habeas corpus against the Secretary of the Air Force. The undisputed facts are as follows.

The petitioner is a civilian residing in Pittsburgh, Pennsylvania. He is a former member of the armed forces of the United States and as such had served in Korea. On May 13, 1953, he was arrested at his place of employment in Pittsburgh by members of the military police and transported to Korea on a charge of having committed
36 murder there while a member of the armed forces.

This procedure was followed under the provisions of Article 3(a) of the Uniform Code of Military Justice, U. S. Code, Title 50, Section 553(a), which provides that any person charged with having committed while in a military status an offense against the Code of Military Justice punishable by confinement of five years or more, and for which that person cannot be tried in the courts of the

Fill in blank with numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate. For summary unless departmental regulations prevent such election.

THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

RANK AND ORGANIZATION OF OFFICER EXERCISING JURISDICTION UNDER ARTICLE 15	SIGNATURE

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NO. *(Inserted by convening authority)*

TO BE FILLED IN BY THE ACCUSED

I ☐ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL	SIGNATURE OF ACCUSED

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE

When an accused has been permitted and has elected to refuse punishment under Article 15, trial by summary court-martial may proceed despite his objection.

1. THE ACCUSED, HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL AND NOT HAVING BEEN PERMITTED TO REFUSE PUNISHMENT UNDER ARTICLE 15, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED

PLACE	DATE

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

Enter after signature, "Only officer present with command," if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY

ORGANIZATION	PLACE	DATE

ACTION OF CONVENING AUTHORITY

RANK AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE , COMMANDING

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION.

RANK AND DESIGNATION OF OFFICER RESPONSIBLE FOR THE ACCUSED'S RECORDS	SIGNATURE

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.

DEFENSE San Antonio

United States or any territory thereof, or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of termination of said status.

In other words, that provision of the Uniform Code of Military Justice extends the jurisdiction of courts-martial to a civilian who had been a member of the armed forces in respect to certain offenses committed while the accused was a member of the armed forces. There is no provision, however, governing arrest or preliminary hearings or method of removing a person taken into custody for trial under this section.

It will be observed that the court-martial by which the accused is to be tried was not convened in Pittsburgh, where the accused lived, but in Korea, where the crime is said to have been committed.

There is no provision of law granting to members of the military police the power or authority to arrest a
37 civilian, even for the purpose of implementing the above-mentioned limited jurisdiction. Therefore, members of the military police, when they arrested the petitioner, had no greater power of arrest than would a private citizen. Obviously, every private citizen has certain powers of arrest, and those are the only powers that the members of the military police had in respect to this petitioner.

Rule 5 of the Federal Rules of Criminal Procedure requires a person making an arrest to take the arrested person, without unnecessary delay, before the nearest available United States Commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.

The commissioner is required to give the person a preliminary hearing. To be sure, the commissioner is not empowered to hold the accused for trial by court-martial. He may hold him for trial only in a District Court. It may be perhaps that there is some way of removing the case from the District Court to the court-martial for trial. The fact is that there is an omission in the Code of Military Justice on this matter. No machinery is provided whereby

96 DEPARTMENT OF THE AIR FORCE
WASHINGTON

Apr 30 1953

Office of the Secretary

Subject: Return of Robert W. Toth (former Airman First Class, AF 13 313 030); Trial by Court-Martial

Thru: The Air Provost Marshal
Headquarters United States Air Force
Washington 25, D. C.

To: Commanding General
Fifth Air Force
APO 970, c/o Postmaster
San Francisco, California

1. Colonel Herman E. Hurst, a person subject to the Uniform Code of Military Justice, having appeared before Lieutenant Colonel Ben Taylor, Adjutant, Headquarters, 75th Air Depot Wing, an officer authorized by law to administer oaths, and he, the said Colonel Hermn E. Hurst, having been duly sworn, signed court-martial charges on 8 April 1953, charging Robert W. Toth (former Airman First Class, Af 1[illegible]13 030) with the premeditated murder of Bang Soon Kil, a male Korean national, on or about 27 September 1952 at K-9 Air Base, APO 970, in violation of the Uniform Code of Military Justice, Article 118; 50 U. S. C. Section 712; and with conspiracy on or about 27 September 1952 to commit premeditated murder, in violation of the Uniform Code of Military Justice, Article 81; 50 U. S. C. Section 675; the said Colonel Herman E. Hurst further having stated under oath that he either had personnel knowledge of or investigated the matters set forth in the charges; that the same are true in fact to the best of his knowledge and belief; the sworn court-martial charges with exhibits thereto having been laid before me; each offense as alleged against the Uniform Code of Military Justice being an offense for which a court-martial may adjudge confinement for five (5) years or more, committed by a person while in a status in which he was subject

a civilian can be arrested and removed to a distant point for trial by court-martial. It would be wrong for the Court to try to supply the machinery which Congress has omitted to furnish.

This subject is a very serious one, as the Court
38 sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done. I think it is the Court's duty to protect the person whose rights have been invaded in this respect.

The Court has no doubt but that the military acted in the best of faith. But I think it acted entirely without authority. The Court had some doubt as to its power to issue a writ of habeas corpus that would be effective in a foreign country in respect to a citizen of the United States. However, both the United States Attorney and the legal representatives of the Air Force, who is present in court, admit that such jurisdiction exists, and its existence was assumed without discussion by the Supreme Court of the United States in Burns v. Wilson, decided on June 15, 1953.

The Court does not feel that it is appropriate at this stage of the proceedings to pass upon the constitutionality of Section 3(a) of the new Uniform Code of Military Justice. That would be important if the court-martial had exercised its jurisdiction and had convicted and sentenced the petitioner. At this time the question is premature.

39 The Court will issue a writ of habeas corpus which will require the defendant to be brought back from Korea to appear before this court.

You may submit your order, gentlemen.

* * * * * * * * * * *

168 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Filed June 25, 1953

Habeas Corpus No. 68,33

UNITED STATES OF AMERICA EX REL AUDREY M. TOTH, *Petitioner*

vs.

HAROLD E. TALBOTT, Secretary of the Air Force, *Respondent*

Order for Issue of Writ of Habeas Corpus

Upon consideration of the Petition for Writ of Habeas Corpus, and the Rule to Show Cause issued herein on May 27, 1953, and the Return and Answer to Rule to Show Cause filed herein on behalf of the Respondent, and upon consideration of the briefs submitted on behalf of the Petitioner and the Respondent and the argument of counsel for the parties, and good cause being shown, it is by the Court this 25th day of June, 1953,

ADJUDGED AND ORDERED that the Clerk of the Court forthwith issue a writ of habeas corpus in this case, returnable in this Court at 10:00 o'clock A. M. on the 9th day of July, 1953, and it is further

ORDERED that the Respondent be directed to produce the body of Robert W. Toth before this Court at the time aforesaid.

s/s ALEXANDER HOLTZOFF
Judge

Seen:

EDWARD O. FENNELL
Assistant United States Attorney

169 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

Petition for A Stay of the Effectiveness of the Court's Order Pending Appeal

Comes now the respondent, Harold E. Talbott, by his attorney, Leo A. Rover, the United States Attorney in and for the District of Columbia, and respectfully petitions this court to stay the effectiveness of this court's order issuing a writ of habeas corpus, for the reason that the respondent feels there are substantial questions of law involved which should be considered by the United States Court of Appeals for the District of Columbia.

LEO A. ROVER
United States Attorney
EDWARD O. FENNELL
Assistant United States Attorney

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170 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

Filed June 25, 1953

Order

Upon consideration of respondent's petition for stay of effectiveness of this court's order pending appeal, it is

ORDERED, this 25th day of June, 1953, that the effectiveness of this court's order issuing a writ of habeas corpus be and it hereby is stayed during the pendency of respondent's appeal to the United States Court of Appeals for the District of Columbia Circuit, on condition that the appeal be diligently prosecuted and that the court-martial proceedings against petitioner be stayed in the meantime.

s/s ALEXANDER HOLTZOFF
Judge

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171 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

Notice of Appeal

Name and address of appellant:

Harold E. Talbott, Secretary of the United States Air Force

Name and address of appellant's attorney:

Leo A. Rover, United States Attorney, Washington, D. C.

Concise statement of judgment or order, giving date:

Order of the District Court, dated June 25, 1953, issuing a writ of habeas corpus

Name of institution where now confined, if not on bail:

A United States Air Force Stokade at Taegu, Korea.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date June 26, 1953

HAROLD E. TALBOTT,
Secretary of the United States Air Force
Appellant.

LEO A. ROVER, United States Attorney
Attorney for Appellant.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 11,883

HAROLD E. TALBOT, Secretary of the Air Force, *Appellant*,

vs.

AUDREY M. TOTH, *Appellee*

Motion to Dismiss the Appeal of Harold E. Talbot, Secretary of the Air Force

AND NOW comes AUDREY M. TOTH, by her Counsel, William A. Kehoe, Jr., and John J. McGrath, and moves this Honorable Court to dismiss the Appeal filed at the above number and term, for the following reasons:

1. That the Order of the United States District Court for the District of Columbia dated June 25, 1953 and indexed in that Court at Habeas Corpus No. 68 of 1953, a copy of which is attached hereto and marked "Exhibit A", is not a final order within the meaning of that term as it appears in the Act of June 25, 1948, c. 646, 62 Stat. 967, as amended, 28 U. S. C. 2253, but on the contrary is an interlocutory order which is not subject to review, on appeal, by this Honorable Court.

2. That the order above referred to in Paragraph 1 is not a final decision within the meaning of term "final decision" as such term appears in the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. 1291-1292, which defines the jurisdiction of the Courts of Appeals, and that therefore this Honorable Court is without jurisdiction to hear this appeal.

3. That said appeal is premature and without any basis in law or fact.

Respectfully submitted,

WILLIAM A. KEHOE, JR.
/s/ JOHN J. McGRATH
Attorneys for Appellee

c/o KANE AND KOOUR
1331 G Street, N. W.
Washington 5, D. C.

Filed Jul 31 1953

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1953

No. 11,883

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Appellant*,

v.

AUDREY M. TOTH, *Appellee*.

Before: EDGERTON, Acting Chief Judge, and PRETTYMAN, and PROCTOR, Circuit Judges.

Order

This case came on for consideration on appellee's motion to vacate the stay order entered herein by the United States District Court on June 25, 1953, and on appellee's motion to dismiss this appeal, and was argued by counsel.

Upon consideration whereof it is ORDERED by the Court that the stay order entered herein by the United States District Court on June 25, 1953, be, and it is hereby, vacated and that this appeal, be, and it is hereby, dismissed.

Dated: July 31 1953

PER CURIAM.

Habeas Corpus

172 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

H. C. 68-53

TO HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

YOU ARE HEREBY COMMANDED, to have body of ROBERT W. TOTH by you restrained of his liberty, as it is said, by whatsoever names detained, together with the day and cause of his being taken and detained, before the Honorable WALTER M. BASTIAN, Judge of the United States Dis-

trict Court for the District of Columbia, at the court room of said Court, in the City of Washington, D. C. at 10:00 o'clock a. m., on the 1st, day of September, 1953, then and there to do, submit to and receive whatsoever the said Judge shall then and there determine in that behalf; and have you then and there this writ.

WITNESS the Honorable Chief Judge Bolitha J. Laws, United States District Judge at Washington, D. C. this 13th day of August, A. D. 1953.

HARRY M. HULL
Clerk.
By RITTA E. SHAYLAND
Deputy Clerk.

Filed August 26, 1953

173 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Motion to Discharge Writ of Habeas Corpus, Dismiss Petition, and Remand Petitioner to Custody of Respondent

Comes now the respondent by his attorney, the United States Attorney, and, for the reasons contained in the attached memorandum of points and authorities, respectfully moves this Court to discharge the writ of habeas corpus, dismiss the petition therefor and remand the petitioner to the custody of respondent.

/s/ LEO A. ROVER
United States Attorney
/s/ WILLIAM J. PECK
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been served personally on attorney for petitioner, William A. Keboe, Jr., Esq. 1331 G Street, N. W., Washington, D. C., this 26th day of August, 1953.

/s/ WILLIAM J. PECK
Assistant United States Attorney

Habeas Corpus No. 68-53

41 UNITED STATES OF AMERICA *ex rel.* AUDREY M. TOTH, *Petitioner*,

v.

HAROLD E. TALBOTT, Secretary of the Air Force, *Respondent*.

Thursday, September 3, 1953.
Washington, D. C.,

The above-entitled matter came on for hearing at 10:30 o'clock a. m., on Thursday, September 3, 1953, in the United States District Court for the District of Columbia, in the Court House, at Washington, D. C.

BEFORE: HONORABLE ALEXANDER HOLTZOFF, District Judge of the United States District Court for the District of Columbia.

66 **Opinion of the Court**

The Court (Holtzoff, J.): This case comes before this Court on a return to the writ of habeas corpus previously issued.

The petitioner for the writ is a civilian, residing in Pittsburgh, Pennsylvania. He was taken into custody in Pittsburgh by police of the Air Force of the United States Army and transported to Korea for trial by court martial on a charge of murder.

Article 3(a), U. S. Code, Title 50, Section 553(a) of the Uniform Code of Military Justice provides that a former member of the military or naval personnel shall be amenable to trial by court martial for certain offenses committed or alleged to have been committed by him while he was in a military or naval status.

67 The charge on which it is proposed to try this petitioner and for which he was taken into custody is a charge of murder said to have been committed while the petitioner was a member of the Armed Forces.

The petitioner for the writ originally challenged the constitutionality of Article 3(a) of the Uniform Code of Military Justice and further challenged the legality of the procedure followed in transporting the petitioner from the place where he was apprehended to Korea.

A rule to show cause why a writ should not be issued was at first granted and after full hearing held on the return to the rule to show cause this Court issued the writ.

This Court adheres to the view that it expressed at that time. The Court deems it premature to pass upon the constitutionality of Article 3(a). The proper time to do so would be if and when the petitioner were tried and convicted by court martial.

The question before the Court, however, is the legality of the restraint of the petitioner in Korea: Article 7(b), (U. S. Code, Title 50, section 561(b)) of the Uniform Code of Military Justice authorizes persons empowered by regulations governing the Armed Forces to apprehend persons, subject to trial by court martial, to do so upon reasonable belief that an offense has been committed and that the person apprehended has committed it. Obviously, this is no greater power than is possessed by every

68 civilian. Any private person may make an arrest for a felony which has been committed upon reasonable belief that the person whom he is arresting has committed that felony.

Article 9(c), which is found in U. S. Code, Title 50, Section 563(c), provides that a civilian subject to trial by

court martial may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject. Obviously, the petitioner is a civilian. He is not subject to the authority of any commanding officer. The statutory provision seems to be a nonsequiter.

Irrespective of this consideration, however, even if it were to be assumed that the apprehension of the petitioner in Pittsburgh were legal, the question still arises, and that is the crux of this case, whether there was any authority to transport him for trial to a distant point, such as Korea.

Congress has not spoken on this subject. The Code contains no provision authorizing the transportation of a civilian from the point where he is apprehended to a distant point for trial by court martial. As the Court indicated on the prior hearing, it has no authority to supply a gap that Congress has not filled.

Transportation of a person to a distant point for trial involves serious consequences. It is contrary to the principle of American institutions to remove a person
69 to a distant point for trial without express authority to do so and without appropriate safeguards provided by statute. In fact, one of the grievances of the Colonists that led to the American Revolution was a threat on the part of the British authorities to remove certain persons from the Colonies to the British Isles for trial.

Whether Congress may constitutionally authorize the military to transport a person to a distant point for trial without a hearing need not be determined because Congress has not done so. It is not a power that can be implied, and it has not been granted expressly.

I reiterate what I said at the prior hearing, namely, that under our system of laws, the civil power is paramount over the military and that the military authority must be exercised within the ambit authorized by Congress.

I do not doubt the good faith of the military in pursuing the course that they have followed, but it is the view of this Court that power to do so does not exist and that there is no authority to remove a civilian for trial by court

martial to a distant point from the point where the civilian is apprehended.

The Court will sustain the writ for the reasons indicated and will discharge the petitioner.

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* * * * * * * * * * *

224 Filed: September 3, 1953

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

VERSUS

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Judgment of Release and Discharge

Upon consideration of the Petition of Audrey M. Toth, sister of Robert W. Toth, the Writ and Answer of Respondent and upon consideration of the Motion to Discharge Writ of Habeas Corpus, Dismiss Petition and Remand Petitioner to Custody of Respondent filed herein on behalf of the Respondent, and the Petitioner's opposition thereto, and the briefs of both parties and argument of counsel in open court, it is by the Court this 3rd day of September, 1953,

ADJUDGED AND ORDERED that Respondent's Motion to Discharge Writ of Habeas Corpus, Dismiss Petition and Remand Petitioner to Custody of Respondent be and the same is hereby overruled, and it is further

* * * * * * * * * * *

/S/ ALEXANDER HOLTZOFF
Judge

Seen:

_____,
Assistant U. S. Attorney

225 Filed: September 3, 1953

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

v.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Order

Upon consideration of the respondent's oral motion for stay of effectiveness of the order of this Court, granting the petition for writ of habeas corpus filed by the petitioner herein, it is,

ORDERED this 3rd day of September, 1953, that the effectiveness of this Court's order granting said petition for writ of habeas corpus be and it is hereby stayed during the pendency of respondent's appeal to the United States Court of Appeals for the District of Columbia.

IT IS FURTHER ORDERED that Robert W. Toth be and hereby is released from the custody of the respondent; provided, however, that the said Robert W. Toth post a bond in the sum of One Thousand Dollars ($1000.00) with surety approved by the Clerk of this Court, conditioned upon his appearance before this Court at the conclusion of the appeal which may be taken by the respondent herein.

s/s HOLTZOFF, J
Judge

226 Filed: September 8, 1953

UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*,

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*.

Notice of Appeal

Name and address of appellant Harold E. Talbott, Secretary of the United States Air Force.

Name and address of appellant's attorney Leo A. Rover, United States Attorney, Washington, D. C.

Offense ——

Concise statement of judgment or order, giving date, and any sentence Order of the District Court, dated September 3, 1953, granting a writ of habeas corpus, and discharging petitioner on bond.

Name of institution where now confined, if not on bail. ——

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date September 8, 1953

/s/ HAROLD E. TALBOTT
Appellant
HAROLD E. TALBOTT,
Secretary of the United States
Air Force.
/s/ LEO A. ROVER
Attorney for Appellant.
LEO A. ROVER,
United States Attorney

Mail copy to attorney for Petitioner:
William A. Kehoe, Jr., Esq.,
1331 G Street, N. W.,
Washington, D. C.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—274257/P.O. 398

[fol. 36] Monday, December 21, 1953

* * * *

Before Honorable Henry W. Edgerton, E. Barrett Prettyman and George T. Washington, Circuit Judges

* * * *

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant,

v.

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH, Appellee

Mr. Oliver Gasch, attorney for the appellant, introduced to the Court Lt. Col. Chester W. Wilson, of the bar of the Supreme Court of the State of Wisconsin, who is on the brief for the appellant.

The argument in the above-entitled case was commenced by Mr. Oliver Gasch, attorney for the appellant, at 2:32; continued by Mr. John J. McGrath, a member of the bar of the Supreme Court of Pennsylvania, who, on motion of Mr. William A. Kehoe, Jr., was permitted to argue, pro hac vice, by special leave of Court, for the appellee, at 3:06; and concluded by Mr. Gasch, at 3:32 to 3:43.

The Court denied Mr. McGrath's oral motion for leave to file an affidavit executed by Robert W. Toth.

[fol. 37] IN THE UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11964

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant

v.

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH, APPELLEE

(File endorsement omitted)

Appeal from the United States District Court for the District of Columbia.

Decided March 25, 1954

Mr. Oliver Gasch, Principal Assistant United States Attorney, with whom *Mr. Leo A. Rover*, United States Attorney, *Messrs. Edward O. Fennell* and *Lewis A. Carroll*, Assistant United States Attorneys, and *Mr. William J. Peck*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellant. *Lt. Col. Chesler W. Wilson*, of the bar of the Supreme Court of Wisconsin, who was allowed to appear *pro hac vice*, was also on the brief for appellant.

Mr. John J. McGrath, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of Court, with whom *Mr. William A. Kehoe, Jr.*, was on the brief, for appellee.

OPINION—Filed March 25, 1954

[fol. 38] Before EDGERTON, PRETTYMAN and WASHINGTON, Circuit Judges.

PRETTYMAN, Circuit Judge: Robert W. Toth[1] was honorably discharged from the United States Air Force on December 8, 1952, after service in Korea. On April 8, 1953, he was formally charged, under the forms and pro-

[1] This action was brought in his behalf by Audrey M. Toth, his sister.

cedure of the Uniform Code of Military Justice,[2] with a premeditated murder allegedly committed in Korea on or about September 27, 1952, that is, while he was in the service.[3] On May 13, 1953, he was apprehended by military personnel at his place of employment in Pittsburgh, Pennsylvania. After various events, including conversations and statements the details of which are in dispute, he was taken by military authorities by plane to Korea, where he was confined pending investigation and trial. Two qualified military counsel were assigned to represent him, and a civilian lawyer from Pittsburgh, retained by his family, flew to Korea with the assistance of the Air Force.

Toth's sister filed a petition for a writ *of habeas corpus* in the United States District Court for the District of Columbia. A rule to show cause was issued; after hearing the writ was issued;[4] Toth was produced in court; a [fol. 39] hearing was held, and Toth was ordered released.[5] The Secretary of the Air Force appealed. The order of release was stayed pending this appeal, and Toth was given liberty under bond.

The problem dissolves into parts. The question in the first part is whether Toth, being a civilian at the time of the filing of charges and at the time of apprehension, is amenable to trial by court-martial for crimes allegedly committed by him while he was in the military service.

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[2] 64 STAT. 108 (1950), 50 U.S.C.A. § 551 *et seq.*

[3] There were two charges, one for conspiracy to murder, in violation of Article 81 of the Uniform Code of Military Justice, and the other for commission of the murder, in violation of Article 118 of the Code, of a Korean named Bang Swoon Kil at or near the K-9 Air Base in Korea on or about September 27, 1952.

[4] Toth v. Talbott, 113 F. Supp. 330 (D.C.D.C. 1953). An appeal from that order was dismissed by this court July 31, 1953, as the order was not final or otherwise appealable.

[5] Toth v. Talbott, 114 F.Supp. 468 (D.C.D.C. 1953).

Article 3(a) of the Uniform Code of Military Justice provides:

> "Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

We think it is clear from the quoted language that, so far as the statute is concerned, the answer to the question above posed is affirmative. The legislative history confirms that view.[6] Indeed, although appellee makes the point, which we shall discuss in a moment, that the Uniform Code itself does not make Toth triable by court-martial, her principal point is that if the statute be construed to make Toth triable it is unconstitutional and therefore invalid.

[fol. 40] Appellee says that Toth, being a civilian and not a soldier at the time charges were placed against him and when he was apprehended, was and is entitled to due process of law in the constitutional sense applicable to civilians. This includes the rights to indictment and trial by jury, as guaranteed by the Fifth and Sixth Amendments, and also to preliminary hearing, removal hearing and all the other provisions of the Federal Rules of Criminal Procedure. Due process of law in military procedure differs, of course, in material respects from due process in the civilian world.[7]

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[6] *Hearings before House of Representatives Subcommittee on Armed Services on H. R. 2498*, 81st Cong., 1st Sess. 617, 800, 883-4, 902, 1262 (1949); H. R. Rep. No. 491, 81st Cong., 1st Sess. 5 (1949); Sen. Rep. No. 486, 81st Cong., 1st Sess. 8 (1949); Morgan, *Court-Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 Miss. L. Rev. 79, 83-84 (1920).

[7] Burns v. Wilson, 346 U.S. 137; 97 L.Ed. —, 73 S.Ct. 1045 (1953).

That a man is answerable for a crime as of the time, place and circumstance of its commission, rather than the time, place and circumstance of his apprehension, is a familiar concept of the law. If a person commits a murder in Paris, France, and is apprehended in Chicago, Illinois, he is triable in Paris under French law, not in Chicago under Illinois law. Indeed, so far as this country itself is concerned, the Sixth Amendment guarantees that an accused be tried where the crime is committed, and he is removable to that place for that purpose.

Trial for an offense is under the law applicable at the time of the offense, unless some other specific arrangement is dictated by the legislature. Under general principles of law a subsequent change of circumstances surrounding the accused, or in the condition in which he may find himself, does not affect his liability for an offense, unless the contrary is indicated by legislation. We see no constitutional infirmity in amenability to trial at the place of the offense and under the law applicable to the offense at the time of its commission.

The Constitution[8] gave Congress power "To make Rules [fol. 41] for the Government and Regulation of the land and naval Forces". Congress has made such rules, and among them is the one before us. In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed. In substance and effect it is a general condition attached by Congress to discharges from the service. We perceive no constitutional invalidity in such a provision.

Both parties seek aid from the Fifth Amendment, which excepts from the requirement of indictment or presentment "cases arising in the land or naval forces". Appellee says a case arises when a charge is made; hence the case against Toth did not arise until April 8, 1953, the date the charges were filed, which was after his discharge; hence the case did not arise in the land or naval forces; hence he cannot be held to answer unless upon indictment. She relies upon the decisions which define a "case" for the "Cases" and

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[8] Art. I, § 8, cl. 14.

"Controversies" clauses of Article III of the Constitution. The Government says a case arises when the crime is committed; hence the Constitution itself excepts the present case from requirement for indictment. It seems to us that although a crime does not become a case, *i.e.*, a legal proceeding, until a charge is made, a case *arises* when the crime is committed; just as a man is born on the day of his birth, although he is not a man until many years thereafter. We think the case against Toth arose in the military forces. This view is in accord with the views expressed in In re *Bogart* [9] and *Kronberg* v. *Hale*.[10]

From 1863 [11] until the enactment of the Uniform Code of Military Justice in 1950, there was in force a statute, [fol. 42] in several successive forms,[12] which provided that a person accused of committing fraud against the Government while in military service was amenable to trial by court-martial after his discharge from the service. The validity of those enactments has been before the federal courts several times [13] and has repeatedly been upheld. The full discussion in the opinion in the earliest of these cases, In re *Bogart*, *supra*, is both pertinent and interesting. In the latest case cited to us, *Kronberg* v. *Hale*, *supra*, the court remarked: "Certainly, or so it seems to us, it is now too late for any federal court short of the Supreme Court to do other than accept the provision as valid." The Supreme Court denied *certiorari*.[14]

In *Hirshberg* v. *Cooke* [15] the Supreme Court discussed the

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[9] 3 Fed. Cas. 796, No. 1,596 (C.C.Cal. 1873).

[10] 180 F.2d 128, 131 (9th Cir. 1950).

[11] 12 STAT. 696.

[12] Article of War 60, REV. STAT. § 1342 (1878); Article of War 94, 41 STAT. 805 (1920), amended, 62 STAT. 640 (1948); Art. 44 (Eleventh) of Articles for the Government of the Navy, 34 U.S.C.A. § 1200, Art. 14 (Eleventh) (1928).

[13] *In re* Bogart, *supra*; *Ex parte* Joly, 290 Fed. 858 (S.D. N.Y. 1922); Terry v. United States, 2 F.Supp. 962 (W.D. Wash. 1933); United States v. Hildreth, 61 F.Supp. 667 (E.D.N.Y. 1945); Kronberg v. Hale, *supra*.

[14] 339 U.S. 969, 94 L.Ed. 1377, 70 S.Ct. 987 (1950).

[15] 336 U.S. 210, 93 L.Ed. 621, 69 S.Ct. 530 (1949).

1863 statute and its successors. The question was whether a man in the Navy could be tried by court-martial for a maltreatment of prisoners allegedly committed by him during a prior enlistment at the end of which he had been discharged. The applicable statute was one of the Articles for the Government of the Navy,[16] the language of which was not specific on the point. The Court based its decision upon its interpretation of that statute. In doing so it stressed the difference between the ambiguous language before it and the clear provisions of the 1863 and similar acts. [fol. 43] The Court did not discuss or pass upon the constitutionality of those statutes. The significant thing to us in our present problem is that it did not mention the subject. It pointed to the 1863 statute *et alia* as containing clear provisions that an ex-service man remained amenable to trial by court-martial for certain offenses committed while in the service, but it did not so much as intimate that such a provision might be unconstitutional. It seems certain that, if the Court had had doubts of the constitutional validity of the 1863 act and its successors at the time it was discussing those statutes in the manner it did in the *Hirshberg* case, it would have indicated those doubts. After all, the invalidity of statutes in force for some eighty-five years and repeatedly upheld by federal courts would be noteworthy in any discussion of the subject. To be sure, such a negative feature of an opinion is not binding authority, but it is certainly a feature of the state of the law upon the topic. We note the fact.

If the statute of 1863 and its successors were valid constitutionally, Article 3(a) of the Uniform Code of Military Justice is valid. The fact that the old statute was applicable to only one crime, while the new one is applicable generally, makes no difference upon the constitutional question.

Appellee contends that Article 3(a) of the Uniform Code does not apply to Toth, because, she says, he can be tried in a court of the United States for the offenses with which he is charged. The argument may be stated as follows, although it is not thus arranged in the brief: Murder committed at a place within the special territorial jurisdiction of the United States is an offense against the United

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[16] 34 U.S.C.A. § 1200, Art. 8.

States.[17] Any land reserved or acquired for the use of the United States and under the exclusive or concurrent [fol. 44] jurisdiction thereof is within the special territorial jurisdiction of the United States.[18] Toth was accused of a murder committed at or near K-9 Air Base, which was in the Republic of Korea. At this point in the argument appellee makes an assertion, which is merely an assumption, that air bases used by the United States Air Force in Korea in 1952 were lands reserved for the use of the United States and under the exclusive or concurrent jurisdiction thereof. Offenses against the United States committed out of the jurisdiction of any particular state or district are to be tried in the district where the offender is found.[19] It follows from this argument, says appellee, that Toth can be tried in the federal District Court for the Western District of Pennsylvania, where he was found, and is therefore not amenable to trial by court-martial.

No authority is cited to us to indicate that K-9 Air Base or any other land in South Korea used as an air base by the United States armed forces was or is, legally speaking, reserved for the use of the United States (or even of the United Nations) or under its exclusive or concurrent jurisdiction, and our research has failed to reveal any authority to that effect. It does not appear, therefore, that the offenses with which Toth is charged could be tried as offenses against the United States within the jurisdiction of a District Court.[20] So far as the United States is concerned, the offenses appear to have been violations of Articles 81 and 118 of the Uniform Code of Military Justice, which provide that any persons in the Military service who commit murder or [fol. 45] conspire to commit murder shall be punished as a court-martial may direct.

The second part of the general problem on this appeal is whether the basic principles of due process of law re-

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[17] 18 U.S.C. § 1111(b).

[18] 18 U.S.C. § 7(3).

[19] 18 U.S.C. § 3238.

[20] See United States v. Bowman, 260 U.S. 94, 67 L.Ed. 149, 43 S.Ct. 39 (1922); Schooner Exchange v. M'Faddon, 7 Cranch (11 U.S.) 116, 3 L.Ed. 287 (1812).

quire that a civilian accused in court-martial charges be given a hearing—call it either preliminary or removal—by a magistrate before he is transported so great a distance as from Pittsburgh, Pennsylvania, to the Republic of Korea. It is not urged that such a requirement applies to a person who is in the service at the time of his apprehension; obviously such a person is subject to orders to go wherever his superiors direct. The contention is that such a requirement, characterized by counsel as a minimum procedural safeguard, attaches to a civilian.

This contention as to preliminary hearing really falls into two parts. The first concerns a hearing preliminary to trial. The second concerns a hearing preliminary to removal to the place of trial. In criminal cases in the courts the constitutional requirement for indictment affords opportunity for inquiry by an independent tribunal into probable cause before the accused is put to his defense. The Constitution specifically excepts cases arising in the land or naval forces from the requirement of indictment. But the Uniform Code of Military Justice makes elaborate provisions for preliminary hearing before the accused is put to trial. Article 32 of the Code provides that charges shall not be referred to a general court-martial for trial until a "thorough and impartial" investigation has been made. At such "investigation" the accused has the right to counsel, civilian or military, and full opportunity to cross-examine witnesses against him and to present anything he may desire in his own behalf. If the charges are then forwarded, a statement of the substance of the testimony taken on both sides must accompany them. Article 34 provides that before directing trial the convening authority must secure the consideration and advice of his legal officer and shall not refer a charge for trial unless he has found [fol. 46] that the charge is warranted by the report of the evidence upon the investigation. These provisions of the Uniform Code seem to afford an accused as great protections by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment. The record indicates, and indeed we must assume in the absence of showing to the contrary, that Toth will be afforded the full protection provided by the Uniform Code. Thus the basic purpose of a hearing preliminary to trial is being

met by a method designed pursuant to constitutional provisions, and the method meets all elements essential to due process in that feature of the proceedings.

The main burden of appellee's contention is that Toth is entitled to a preliminary hearing before removal. Such a requirement might exist by reason of constitutional provisions or by reason of statutory provisions. "There is no constitutional right to a hearing in advance of removal", the Supreme Court said in *United States* ex rel. *Kassin* v. *Mulligan*.[21] And again the Court said, "The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge."[22] We must deem it settled then that there is no constitutional necessity for hearing prior to removal to the proper place for trial.

There is no statutory requirement for a hearing before removal in military cases. The 1863 statute and its successors provided that an accused "shall continue to be liable to be arrested and held * * * in the same manner and to the same extent as if he had not been so separated [fol. 47] therefrom", *i.e.*, from the service.[23] We do not find any similar provision in the Uniform Code, but neither does the Code contain a requirement for hearing prior to removal to the place of trial.

In the federal courts hearings prior to removal are required by Rules 5 and 40 of the Federal Rules of Criminal Procedure, but those Rules do not apply to court-martial proceedings.

Appellee cites to us the rule of the *McNabb* case.[24] That rule dealt with the admissibility of confessions. It is clear from the opinion in that case and the opinions in the

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[21] 295 U.S. 396, 460, 79 L.Ed. 1501, 55 S.Ct. 781 (1935) (opinion by Mr. Justice Butler).

[22] Hughes v. Gault, 271 U.S. 142, 149, 70 L.Ed. 875, 46 S.Ct. 459 (1926) (opinion by Mr. Justice Holmes).

[23] See 62 Stat. 641 (1948).

[24] McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943).

Mitchell[25] and *Upshaw*[26] cases that the requirment for prompt preliminary hearing was imposed by the Supreme Court as a rule of evidence in the federal courts and not as a rule of constitutional necessity.

Section 11(b) of the Manual for Courts-Martial[27] provides: "Jurisdiction under Article 3*a* should not be exercised without the consent of the Secretary of the Department concerned." "Article 3*a*" is the part of the Uniform Code with which we are presently concerned. Section 11(b) of the Manual is a safeguard interposed by the President[28] against the arbitrary subjection of civilians to trial by courts-martial for offenses committed while they were in the service. This provision has been complied with in the present case.

[fol. 48] Most important in this connection is the fact that the federal courts were open to Toth upon petition for a writ of *habeas corpus* at every instant after his apprehension.[29] Whatever constitutional rights Toth had were always enforceable in a federal court.

It is well to keep in mind that the sole purpose of a removal proceeding is to make certain that the accused is not being transported without probable cause to believe that he committed the offense. It is not its purpose to impede the trial of an accused for an offense for which there is reason to put him to his defense. So, when discussion relates to the inconvenience, cost, etc., of long-distance removals, it must be remembered that the inconvenience, etc., which is to be condemned relates only to removal without probable cause. If there be probable cause to believe the accused guilty, he is amenable to trial, and the inconvenience to him of that trial is immaterial. An accused

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[25] United States v. Mitchell, 322 U.S. 65, 88 L.Ed. 1140, 64 S.Ct. 896 (1944).

[26] Upshaw v. United States, 335 U.S. 410, 93 L.Ed. 100, 69 S.Ct. 170 (1948).

[27] 16 Fed. Reg. 1303, 1308 (1951).

[28] Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951).

[29] Burns v. Wilson, *supra* note 7.

cannot interpose valid objections to trial by removing himself a long distance from the scene of the alleged offense.

We are accustomed to the idea that a hearing preliminary to removal out of this country for crime is essential to a valid removal. But that idea stems from our familiarity with extradition proceedings. In those proceedings one sovereignty is transferring to the custody of another sovereignty a person found within the former state. A responsibility is upon the asylum state not to surrender its resident or visitor without probable cause. The matter is controlled by extradition treaties or statutes. But none of those principles applies to a case like the present one. Here it is not proposed to remove the accused from the custody of the United States Government.[30] The United States apprehended him, and the United States proposes to try him. [fol. 49] The removal is a matter of distance, not a matter of jurisdiction.

Toth has not urged that due process requires that he be given a hearing before a civil tribunal prior to being subjected in any way to the jurisdiction of a military tribunal. We have considered that question, however, because we think it may be a more fundamental inquiry in this case than the question whether Toth is entitled to a hearing before being removed from the territorial limits of this country. But we have found no principle or precedent which would make a civilian hearing a constitutional prerequsite of military jurisdiction over Toth. Ex parte *Milligan*[31] no doubt stands today for the proposition that if the military authorities lack jurisdiction over a civilian *habeas corpus* will effectuate his release at any stage of his confinement. But neither that case nor those following it contain any suggestion that if the military authorities do have jurisdiction over a civilian there must be a preliminary hearing before a civil tribunal to make his apprehension by those authorities and trial before a military tribunal constitutionally valid.

Cases arising under the draft laws are not helpful. If

[30] Beavers v. Henkel, 194 U.S. 73, 48 L. Ed. 882, 24 S.Ct. 605 (1904).

[31] 4 Wall. (71 U.S.) 2, 18 L.Ed. 281 (1866).

the relator has never been "actually" inducted into the army within the meaning of the governing statute, *habeas corpus* lies to challenge his purported induction and bring about his release.[32] In such cases the induction is the dividing line between civil and military jurisdiction. But in the present case there is no attempt to put Toth back into the armed services. He is a civilian who is to remain a civilian, even though for certain restricted purposes Congress has declared that civilians in his category are to remain subject to military law and trial before military [fol. 50] tribunals. Military trials of civilians and other non-members of the armed services in limited classes of cases antedate our Constitution.[33] It may be that Congress cannot in time of peace add to those classes of cases by making civilians subject to military justice in cases not "arising in the land or naval forces" within the meaning of the Fifth Amendment. But that question is not before us now. All Congress has done here is to deal with a class of cases which did arise in the armed services. As pointed out earlier in this opinion, it is too late for any court other than the Supreme Court to say that its action in so doing was unconstitutional, even though no provision was made for a hearing before civilian authorities prior to the subjection of the accused to military law.

Some suggestion is made that the question of hearing is moot, since Toth is now before a federal court and has had a hearing. In so far as Toth's claim relates to rights which arose from the fact of his apprehension and his initial removal from this country, perhaps it is moot. He has had opportunity to present such a claim to a court. But, in so far as his claim is upon other grounds, involving amenability to military authority or attacking military processes, it is not moot. Certainly we cannot say that the whole hearing problem as Toth presents it is moot.[34]

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[32] See Billings v. Truesdell, 321 U.S. 542, 88 L.Ed. 917, 64 S.Ct. 737 (1944).

[33] *Cf. Ex parte* Quirin, 317 U.S. 1, 87 L.Ed. 3, 63 S.Ct. 1 (1942).

[34] See Eagles v. Samuels, 329 U.S. 304, 91 L.Ed. 308, 67 S.Ct. 313 (1946).

The trial court expressed the view that there is no power or authority to remove a civilian for trial by court-martial to a point distant from the place where he is apprehended.[35] We think, as we have indicated at length, that the statute [fol. 51] which makes a civilian amenable to trial by court-martial necessarily connotes authority to apprehend him for that purpose and to remove him for trial to the place where the alleged offense was committed.

It may very well be that Congress should add to the Uniform Code a provision that a civilian apprehended under Article 3(a) pursuant to court-martial charges should not be removed from continental United States for trial until he has had a preliminary hearing before either a civil magistrate or a military tribunal. After all, transposition from civilian life back into military life and transportation from continental United States to far places of the earth are violent events, even though it be to an accused's benefit to be tried at the place where the crime is allegd to have been committed. And from the standpoint of the military establishment a routine authoritative inquiry prior to drastic removal steps would save time, expense and complications, if in the absence of such an inquiry the federal courts are likely to order an accused returned, as was done in the case at bar. But such questions are for Congress, not for the courts. The Constitution put the government of the land and naval forces in the hands of the legislative branch, not of the judicial branch. Absent constitutional invalidity in legislative action, or in executive action purportedly pursuant to legislative direction, the courts have no function in that field. Therein the situation differs from that in the field of court proceedings, where the Supreme Court has supervisory authority over procedure.

The sum of the matter as to a removal hearing in military proceedings is (1) that the Constitution does not require one, (2) that no statute requires one, and (3) that the judicial branch of government has no power to require one. When an accused alleges to a court that he is actually threatened with removal in violation of a constitutional or statutory right, the court will hear him. [fol. 52] The situation is illustrated by the present case, in

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[35] *Supra* note 5, at 470.

which the accused upon petition to a court was given a hearing upon the constitutional validity of his apprehension and removal. But the court cannot consider alleged procedural invalidity in military proceedings which do not involve a violation of constitutional or statutory requirements.

It is suggested that Articles 3(a) and 9(c) of the Uniform Code are inconsistent with each other. The latter Article provides that a civilian subject to the Code "may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject". But "arrest or confinement" in military parlance is a restraint by order, as contrasted with a taking into custody, which is termed "apprehension". A strict distinction between the two is made in military rules.[36] We see no inconsistency between the Articles.

Assertions that fundamental precepts of that fair play which constitutes so much of the American sense of due process of law have been violated, always arouse interest and particular care. So it is in this case. But we must be mindful that this man is accused of committing a premeditated murder while in uniform and that the line of authority which proposes to subject him to trial upon that accusation is a legal authority acting under rules established by the Congress itself under direct authority of the Constitution itself. We have examined his contentions with care. We can perceive no constitutional reason why his liability to apprehension and trial according to the rules applicable to him at the time and place of the commission of the crime should not follow him to other places and past his discharge into civilian life. If we found the provisions of those rules inherently invalid, [fol. 53] or the officials abusing their authority, we would exercise our power of protection. We do not find them so.

The judgment of the District Court will be reversed and the case remanded with instructions to discharge the writ and to return Toth to the custody of the military authorities.

Reversed and remanded.

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[36] See Secs. 18-21 of the Manual for Courts-Martial, 16 Fed. Reg. 1310-1311 (1951).

[fol. 54] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Mar. 25, 1954. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, JANUARY TERM, 1954

No. 11,964

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant,

v.

UNITED STATES OF AMERICA, ex Rel. AUDREY M. TOTH, Appellee

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Prettyman, and Washington, Circuit Judges

JUDGMENT

This cause came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

Dated: March 25, 1954.

Per Circuit Judge Prettyman.

[fol. 55] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 26, 1954. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,964

HAROLD E. TALBOTT, Secretary of the United States Air Force, Appellant,

vs.

UNITED STATES OF AMERICA, ex Rel. AUBREY M. TOTH, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Minute Entry of Argument.
3. Opinion.
4. Judgment.
7. This designation of record.
8. Clerk's certificate.

William A. Kehoe, Jr., Attorney for Appellee.

Certificate of Service

I certify that I personally served a copy of the foregoing Designation of Record on Leo A. Rover, Esq., United States Attorney, attorney for appellant herein, on the 26th day of April, 1954.

William A. Kehoe, Jr.

[fol. 56] Clerk's Certicate to foregoing transcript omitted in printing.

[fol. 56] Filed June 25, 1953, Harry M. Hull, Clerk

H. C. 68-53

UNITED STATES OF AMERICA

DEPARTMENT OF THE AIRFORCE

Washington, D. C., 17 June, 1953

I hereby certify that the attached are photostatic copies of duplicate originals of the following: affidavit of Park R. McCandless, 29 May 1953; affidavit of Joseph T. Kearns, Jr., 29 May 1953; certified true copy of statement of Captain Edwin A. Jerome, 22 May 1953; affidavit of Staff Sergeant Cesar A. Rodriguez, 29 May 1953; affidavit of Staff Sergeant Cesar A. Rodriguez, 29 May 1953; affidavit of Staff Sergeant William F. Mayers, 29 May 1953; affidavit of Captain Edwin A. Jerome, 29 May 1953; certified true copy of letter to Captain Edwin A. Jerome, 13 May 1953; photostatic copy of receipt for prisoner, Robert W. Toth, civilian 18 May 1953; certified true copy of Letter Orders: 166; subject: Temporary Duty Orders, Hqs CONAC, 12 May 1953; affidavit of Major George S. Owen, 29 May 1953, with three incls.; and original additional charges in court-martial case of Robert W. Toth, civilian (formerly Airman First Class, AF 13 313 030). Duplicate originals of the attached copies are on file in the office of The Judge Advocate General, USAF.

Albert M. Kuhfeld, Brigadier General, USAF Acting
The Judge Advocate General, USAF.

I hereby certify that Brigadier General Albert M. Kuhfeld, who signed the foregoing certificate, is the Acting The Judge Advocate General, United States Air Force, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Harold E. Talbott, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secre-

tary of the Department, at the City of Washington, this 17th day of June, 1953.

Harold E. Talbott, Secretary of the Air Force. By Philip J. Curran, Deputy Administrative Assistant. (Seal.)

[fol. 57] Harrisburg, Pennsylvania, 29 May 1953

Come, Park R. McCandless, who being first duly sworn does depose and swear as follows:

On March 1953, Major Owen L. Colaw, District Commander, 3d District Office of Special Investigations (IG) USAF, advised me by telephone that Special Agent Joseph T. Kearns, Jr. would arrive in Pittsburgh, Pa. the following day. Major Colaw directed me to assist Kearns in interviewing Robert W. Toth, 220 Dunseith Street, Pittsburgh, Pa., former A/1C, AF-43313030, and that the purpose of the interview was to determine any knowledge Toth might have regarding the homicide of a male Korean National in the Bomb Dump Area, 543d A.S.S.D., APO 970, during the period 26-27 September 1952.

A previous investigation had revealed that Toth was employed by the Jones and Laughlin Steel Corporation, Pittsburgh, Pa. I had also determined that Toth was currently employed as a Bed Helper, Rolling Mill Conditioning Department at the Second Avenue Plant, with Time Card No. 5784. Also that he was expected to report for work at 0001 hours 11 March 1953 at the No. 18 Mill Gate, and would work until 0800 hours 11 March 1953.

Kearns arrived at the office of the Pittsburgh, Pa. Detachment 081, 701 Victory Building, at 1200 hours 10 March 1953. He acquainted me with the details of the case involving Toth from reports previously submitted. It was decided that the best time to interview Toth would be after he left the Plant at 0800 hours 11 March 1953. Through contacts in the Jones and Laughlin Police Department, it was arranged to have the guard at No. 18 gate, identify Toth as he left the Plant at 0800 hours 11 March 1953.

On 11 March 1953 at 0715 hours, I left the Pittsburgh Detachment office by automobile with Kearns and Mrs. Marian Hunt, Pittsburgh Detachment stenographer. We arrived at No. 18 gate at approximately 0735. Mrs. Hunt remained

in the car. I told the guard at the gate who I was, and he said that he had been instructed by the guard sergeant to identify Toth.

At 0800 hours, the guard brought a man to Kearns and I, who were waiting at the gate, and identified him as Toth. Kearns and I exhibited our credentials and identified ourselves as Special Agents of the Office of Special Investigations to Toth. Kearns asked Toth if he would come to the OSI office with us on an official matter and Toth agreed. We left the Plant at approximately 0805 hours. Nothing was said regarding the nature of the official business, during the trip to the Detachment office.

At 0830 hours Toth was interviewed in the Detachment Commander's office by Kearns in the presence of Mrs. Hunt and myself. Kearns kept a log of the interview. I read to Toth the 5th Amendment to the Constitution of the United States and Article 31(b), Uniform Code of Military Justice and explained to him his rights under each. Kearns stated to Toth that the matter under investigation was the homicide of a male Korean National in the Bomb Dump Area, 543d A.A.S.D., APO 970, on 26-27 September 1952. [fol. 58] At this time Toth admitted to Kearns knowledge of the incident but said he did not want to discuss it. Toth continued that he had never discussed it with any other person, that he had forgotten it until now, and would not say anything about it on the grounds that he might incriminate himself. Kearns asked him a number of additional questions and then asked Toth to think over his refusal for a few minutes. Toth repeated that he did not want to talk about it and would "Sweat it out."

Kearns told Toth that he was not under restraint of any kind and could leave whenever he wanted. At 0930 hours Toth said he wanted to go and the interview was terminated.

Further, the deponent sayeth not.

Park R. McCandless, Special Agent, 3d District OSI (IG) USAF.

Sworn and subscribed to before the undersigned authority at Olmsted Air Force Base, Middletown, Pa., this 29th day of May 1953. George C. Perry, III, 1st Lt, USAF, Summary Court and Judge Advocate.

[fol. 59] Harrisburg, Pennsylvania, 29 May 1953

Come, Joseph T. Kearns, Jr., who being first duly sworn does depose and swear as follows:

On March 1953, I was directed by Major Owen L. Colaw, District Commander, 3d District Office of Special Investigations (1G) USAF, Harrisburg, Pa., to proceed to Pittsburgh, Pa. I was instructed to interview, together with Special Agent Park R. McCandless, former A/1C Robert W. Toth, AF-13313030, 220 Dunseith Street, Pittsburgh, Pa. The purpose of this interview was to determine whether Toth participated in, or had knowledge of, the homicide of a male Korean National in the Bomb Pump Area, 543d A.S.S.D., APO 070, during the period 26-27 September 1952.

I departed Harrisburg, Pa. at approximately 0700 hours, 10 March 1953, and arrived at the Office of the Pittsburgh, Pa. Detachment of the 3d District Office of Special Investigations (1G) USAF at approximately 1200 hours, 10 March 1953. I reported to Special Agent Park R. McCandless, Detachment Commander. The facts of the case as known to that point were discussed by both of us and a plan of operation was developed.

Prior to my arrival, Special Agent McCandless had determined that Toth was employed as a Bed Helper in the Rolling Mill Conditioning Department, Second Avenue Branch, Jones and Laughlin Steel Corporation, Pittsburgh, Pa. It had been determined also that Toth, Time Card No. 5784, was working on the 0001-0800 hours shift for the next several days. McCandless learned that Toth entered and left the plant through the No. 18 Mill Gate.

Subsequent to my arrival, McCandless arranged with the Jones and Laughlin Steel Corporation Plant Police to identify Toth as he left work at 0800 hours, 11 March 1953.

0715 hours, 11 March 1953, McCandless and I, together with Mrs. Marian Hunt, Stenographer, Pittsburgh, Pa. Detachment, left that office and proceeded by personally-owned automobile to No. 18 Mill Gate, Jones and Laughlin Steel Corp. We arrived at that point at approximately 0735 hours. McCandless identified himself to the guard on duty at that point, who stated that he had been instructed by his superiors to identify Toth for us.

At 0800 hours, 11 March 1953, Toth was identified by the guard. I spoke to Toth, introducing McCandless to him, and both of us identified ourselves by presenting our OSI credentials. At this time, I asked Toth whether he would voluntarily accompany McCandless and me to the Pittsburgh Pa. Detachment Office. It was explained to him that it was a matter of official business which required his presence. Toth agreed to volutarily accompany us to the office. At this time I reminded Toth that he was just finishing a shift of work and asked him whether he felt the need for sleep. Toth said that he had had a good night's sleep prior to reporting for work, and that he was not tired.

[fol. 60] We departed No. 18 Mill Gate at approximately 0805 hours, 11 March 1953, and arrived at the Pittsburgh, Pa. Detachment Office at approximately 0825 hours. During the ride to the office Toth, McCandless and I engaged in general conversation in which the subject under investigation was not mentioned.

Upon arrival at the Detachment Office, Toth stated to the writer that he had debated during the ride to the office whether he should ask at that time why he had been requested to accompany us to the office and what was the nature of the official business. He added that he had decided not to do so because his duties as an air policeman overseas had brought him into contact with OSI, and he knew that he would be advised of this information at the proper time.

The interview with Toth began at 0830 hours, 11 March 1953. It was held in the Office of the Detachment Commander, Special Agent McCandless. Present were McCandless, Toth, Mrs. Hunt and writer. Initially Toth was again advised of the identities of McCandless and the writer. At 0832 hours, McCandless read to Toth Article 31(b), Uniform Code of Military Justice, and the 5th Amendment to the Constitution of the United States. His rights under both were explained to him by McCandless. I advised Toth that the investigation being conducted concerned the homicide of a male Korean National in the Bomb Dump Area, 543d AA.S.D., APO 970, during the period 26-27 September 1952. In response to my questioning, Toth admitted that he had knowledge of the incident in question, but that he did not want to discuss it. He stated that he did not want to discuss it because he did not to incriminate himself.

He said that he would not voluntarily furnish information concerning the incident. Toth advised that he had not discussed it with anyone, adding that he had forgotten all about it until the time of the interview. He said that he did not want to furnish a statement, indicating that he would not discuss the matter. Toth said that he was aware of the purpose of the investigation, and that he would rather not talk. He denied that he had a sense of loyalty to anyone else concerning this matter.

I explained to Toth that I was aware that perhaps he had not had time to collect his thoughts, having been confronted at his place of employment and requested to voluntarily accompany us to the detachment office. I suggested that he consider the situation, his knowledge of it, and his participation in it. Toth again stated that he did not with to talk about it. Toth advised that he was not a member of the Reserves, and that he did not intend to leave the area. I again told Toth that we were not going to threaten him, nor promise him anything. I pointed out the advantage of Toth giving us his side of the story to the best of his knowledge. Toth said that he did not want to talk about it and that he would "sweat it out".

During the interview, I repeatedly advised Toth that he was not under arrest and was not to consider himself as being held against his will. I pointed out that he had accompained us voluntarily, and that he could terminate the interview when he desired. After making the statement that he would "sweat it out", Toth said that he wished to leave. I immediately agreed, and Toth left the detachment office at 0930 hours, 11 March 1953.

[fol. 61] Further, the deponent sayeth not.

Joseph T. Kearns, Jr., Special Agent, 3d District OSI (IG) USAF.

Sworn and subscribed to before the undersigned authority at Olmsted Air Force Base, Middletown, Pa., this 29th day of May 1953. George C. Perry, III, 1st Lt, USAF, Summary Court and Judge Advocate.

[fol. 62] 22 May 1953

Statement :

I Edwin A. Jerome, Captain, AO 802757, 2500 Air Base Wing, Mitchel AFB, Hempstead, New York, prior to making the following statement have had my rights under Article 31 MCM 1951 (5th Amendment to the Constitution), read and explained to me by Special Agent James W. Reese who has identified himself to me as a Special Agent of the Office of Special Investigations, USAF. I understand those rights and freely and voluntarily make this statement without being compelled to do so by any form of duress, coercion, hope of reward or promise of immunity.

The undersigned, after duly receiving orders to arrest and apprehend Robert W. Toth at Pittsburgh, Pennsylvania, effected the same on 13 May 1953. While transporting Toth to Korea aboard Pan American Flight 331/16, subject made the following statement to me concerning his alleged offense while in Korea.

He stated on the night of the alleged offense that he was Sgt of the Guard and that he had been notified that a trespasser was apprehended on a security post at the bomb dump. The Air Police Sentry who had K-9 sentry dog with him had the trespasser at bay. Upon arriving at the scene, Toth stated he told the Air Police Sentry, Kinder, that their orders were to shoot any trespassers. The trespasser was then loaded aboard the Air Police jeep and taken back to Air Police Headquarters.

Toth further stated that while going back to Air Police Headquarters, the trespasser who was a Korean National attempted to grab his pistol from his holster. Upon doing this, Toth had the jeep stopped and proceeded to beat the Korean National with his pistol as punishment. Toth stated that they then proceeded to Air Police Headquarters where the OD and Lt Schreiber were notified. Toth stated that Lt Schreiber directed him to return the Korean National to the place of apprehension and dispose of him by shooting him. Toth stated that he objected to this but complied with the order regardless. Upon arriving at the original

place of apprehension, Toth and Kinder unloaded the Korean National from the jeep. Toth stated that Kinder refused to shoot the Korean National because he did not feel that it was just. Toth then again reminded Kinder of his orders and stated that he would depart the scene and when he returned, he expected Kinder to carry out his orders because of the previous order of Lt Schreiber and the apparent directives which allowed the use of weapons on trespassers of restricted areas. Toth further stated that he left the scene about 100 yds and upon hearing the shot, [fol 63] returned to the scene where the original apprehension was made.

Toth stated that the Lt had previously instructed them to re-enact the complete scene so that it would conform with a routine shooting in a restricted area.

The undersigned asked why this whole thing took place and Toth stated that he believed the Lt was "out to get glory". He stated that as a result of this act, the unit was later commended in official communications. Toth further stated that while in Pittsburgh, Pennsylvania, he received a letter from Lt Schreiber which stated that this incident was presently under investigation and that he advised Toth to keep quiet about the whole thing.

The undersigned gained this information through an informal interview with Toth while enroute between Honolulu and Wake Island. It was made voluntarily during the course of conversation. I advised Toth that he did not have to tell me if he did not want to and I did not explain his rights under the 31st Article to him. Despite these facts, he made the statement to me voluntarily. I believe that similar statements were made under the same circumstances to the two escort Air Policemen accompanying me—M Sgt Charles E. McCreedy and A 1C Albert R. Menard.

I have read this statement consisting of 2 pages and have initialed all pages and corrections. This statement, which

I have given voluntarily and now sign voluntarily, is the truth to the best of my knowledge and belief.

(S.) Edwin A. Jerome.

WITNESSES:

(S.) Dargle R. Stuckey, Capt.
(S.) James W. Reese.

A certified true copy.

Louis F. Alyea, Lt Col. USAF, Acting Staff Judge Advocate, Continental Air Command.

[fol. 64] AFFIDAVIT

STATE OF NEW YORK,
County of Nassau ss:

S Sgt Cesar A. Rodriguez, AF 19305575, having been duly sworn, deposes and says as follows:

On the 14th day of May, 1953, at approximately 1730 at the guardhouse shower room, Andrews AFB, I was on duty as Air Police guard in custody of Robert Toth. At that time I accompanied him into the shower room, my instructions being that I was to remain with him at all times until properly relieved. Robert Toth, without being asked to make any statement or answer any questions by me, voluntarily stated the following information to me:

"I was on duty as the Sergeant of the Guard in Taegu at the 'bomb-up'. A 'gook' who was drunk came into the area. The guard was on duty with a dog and he hollered twice to the Gook to halt and when the Gook didn't stop he tried to get the dog to stop him and the dog wouldn't attack. Then the guard fired two shots. These shots woke me and I went to the area in a government jeep, where I had heard the shots. When I arrived I asked the guard what was the matter and the guard told me what had happened. Then Toth tried to get the dog to attack the Gook, and the dog wouldn't attack. The guard and I, together, put the Gook in the jeep. After we got the Gook in the jeep, the Gook who was in the back I was driving and he went for my pistol. I knocked hell out of him with the

back of my hand, hit him behind the ear. I took the Gook on to the office and reported to the Officer of the Guard. I told the officer what had happened and he said take him out and shoot him. Then I drove the Gook and the guard back to the 'bomb-up'. I knew they were going to shoot the guy but I didn't want anything to do with it so I got the hell out of there. When I was back at the guardhouse I heard a shot, got in the jeep [fol. 65] and went back to the 'bomb-up'. When I got there, I saw the Gook lying on the ground. He had been shot. I called for an ambulance and they transported the Gook to the hospital and he died in the hospital.

"I went back to the guardhouse and wanted to make a report of the incident, put it in the log book, but the officer told me to forget about it, that he didn't want it put in the report. I had forgotten all about it until I came back to the States and one day I found out from a neighbor that the OSI had been over there asking questions about it and they were tailing me. One day they picked me up and held me for about three hours and because it was so embarrassing to me in the neighborhood and because of the way they treated me, I wouldn't give them any information. I'm glad I'm going back because I want to get it over with. I know everything is going to be alright.

"Toth also stated the officer's name who said to shoot the Gook but I don't recall the name."

I have read over the above statement and reviewed all the contents and state to the best of my knowledge and belief that it is an accurate and true representation of what was stated to me by Robert Toth and in substantially the same words, to the best of my memory.

Cesar A. Rodriguez, S/Sgt., AF 19305575

Subscribed and sworn to before me, this 29th day of May, 1953.

Louis F. Alyea, Lt. Col., USAF, Acting Staff Judge Advocate, Continental Air Command.

[fol. 66] AFFIDAVIT

STATE OF NEW YORK,
County of Nassau, ss:

S/Sgt. Cesar A. Rodriguez, AF 19305575, having been duly sworn, deposes and says as follows:

On the 12th day of May, 1953, I was called down to Continental Air Command Headquarters at approximately 1600 hours in the afternoon. I was informed by Major Owen, Assistant Provost Marshal, Continental Air Command, that I had been detailed for an apprehension. Major Owen briefed S/Sgt. Mayers and myself. Major Owen told us what was going to take place; that we were going to the town of Pittsburgh, Pa., first and then we were to go to Washington. He told us to be at Base Operations at 0930 the next morning. We took off from Mitchell Air Force Base at about 1000 hours, the 13th day of May 1953.

We landed at Pittsburgh, 2253rd AFRCTC and I was instructed by Major Owen to wait there while he and other Air Policemen and Captain Jerome went into Pittsburgh.

Approximately two hours elapsed. At approximately 1700 hours I was at Base Operations and was ordered down to the Provost Marshal's Office. I was instructed by Major Owen that I would now be in charge of Toth. The Major identified Robert Toth to me. They were then processing Toth and I was guarding him. The party then proceeded to the mess hall. We ate in the Officer's section of the mess hall, and Toth and I sat at one table and ate together. He ate a full meal, and when he finished his meal, I asked him if he wanted any more, and he stated "no". After finishing the meal, we returned to the Provost Marshal's Office. At this time he was allowed to make a telephone call to his family.

His mother answered the phone and he requested to speak to his stepfather. He told his stepfather that he was picked up by the AP's, that they were taking him back to Korea, that they should not worry about anything and that he would

[fol. 67] be home in about a week. We had said nothing to indicate to him that he would be gone only a week. During the conversation he said to tell his girl that, "I am sorry I can't take her to the prom Friday night." He said, "Wait until you get into the service long enough and you will find they can take you back." After he hung up he said "That was my little brother who is in the service."

Major Owen then asked him if he wanted to get in touch with a lawyer or anyone else. He replied in the negative. Major Owen asked him the second time if he wanted to make another telephone call and he said, "no".

After that, the Major instructed the that we were ready to leave, and we proceeded to the waiting aircraft and to Andrews AFB. During the plane flight Toth slept most of the time.

On arriving at Andrews AFB, Toth and the party dismounted from the aircraft. At this time I was instructed by Major Owen to get into a vehicle with Toth and see that he was transported to Andrews AFB Hospital for a physical examination.

At the infirmary Toth was given a complete checkup by a Medical Officer, in my presence. He made no objection to the examination. After the examination, he was transported to the Base Guardhouse.

Major Owen said that Sgt. Mayers and myself would be in charge of guarding Toth and he wanted one of us to be there at all times.

About midnight I asked Toth if he wanted anything to eat and he said "no". About that time he retired and went to sleep. All during the night he was under the guard of either Sgt. Mayers or myself. He slept well and we woke him at approximately 6 o'clock and asked if he wanted to eat. He had a full meal. I asked him if he wanted to shave and he said, "no". He was given a towel, soap and shaving equipment by the Guard Supervisor.

Toth ate breakfast in the guardhouse. I then asked if he wanted anything; and he refused. About 11 o'clock I asked him again if he was hungry and he said, "no". He said he

wanted a cup of coffee and he was then given a cup of coffee.

About 8 o'clock that morning I told Toth he could write a letter if he wanted to and he said he did not have any paper [fol. 68] so I got some writing paper and a pencil so he could write a letter home. He gave me the letter which I in turn gave to Major Owen.

At approximately 1300 hours I was relieved by another guard to get some rest. About 1630 we again assumed responsibility of the guard. I again asked the man if he was hungry. This time a tray was brought to him and he did not eat everything on the tray. I then asked him if he needed anything and he said, "no". I asked him if he wanted anything to read; if he wanted to write any more letters; and if he had enough smokes? He replied that he had everything; he did not want to write any letters, and he had enough to read and had enough cigarettes, and that he had been given a carton of cigarettes. During this time he was not upset and acted normal.

Before dinner he took a shower. I was relieved about 1800 hours and laid down in the next room. From 1800 to 2400 hours, Sgt. Mayers had responsibility of guarding Toth.

About midnight I again resumed responsibility. I immediately checked, he seemed to be sleeping well. I awoke him about 0530 and told him to get ready as we were going to leave about 0700. His breakfast was brought in and he ate a large breakfast; then he went in and washed up and shaved. During the time he was taking the shower, he said that we were treating him like a king. That is when he stated that he had been an Air Police and he was never treated so good by anyone.

That morning, about 0730, we left Andrews AFB and arrived at Washington International Airport at approximately 0815. We proceeded to the VIP Lounge. I bought him a couple of cokes. His morale was high and he did not seem depressed.

At approximately 1000 I was instructed by the Flight Clerk, that we could board the aircraft. At this time we

boarded the aircraft and Toth was turned over to Captain Jerome. At no time was any force of any kind used.

Cesar A. Rodriguez, S/Sgt, AF 19305575

Subscribed and sworn to before me this 29th day of May, 1953. Maude E. Hansen, Notary Public, State of New York, No. 30-1668100, Qualified in Nassau Co., Term expires March 30, 1955. (Seal.)

[fol. 69] AFFIDAVIT

STATE OF NEW YORK,
County of Nassau, ss.

S Sgt. William F. Mayers, AF 20228205, having been duly sworn, deposes and says as follows:

On the 12th day of May, 1953, I was instructed to report to Continental Air Command Headquarters, at approximately 1600 hours. I was informed by Major Owen, Assistant Provost Marshal, Continental Air Command, that I had been detailed for an apprehension. During this meeting I learned that I was part of an apprehension team that was going to Pittsburgh to apprehend a civilian who was a former member of the Air Force. I was instructed to be at Base Operations at 0930 hours the following morning. We departed from Mitchel Field by aircraft at approximately 1000 hours, 13 May 1953.

We landed at Pittsburgh at approximately 1335 hours. At approximately 1530 hours, Major Owen, Captain Jerome, M Sgt. McCreedy, A/1C Menard and myself departed from the airport for the OSI Office. A brief conference in regard to this apprehension was held and we then proceeded with the same persons and two OSI agents, whose names I do not know, to the steel plant where the apprehension was to take place. We arrived in what I think was the plant guard office and Toth, together with members of the plant police force, was in the office. Toth was informed by Major Owen of the charges against him and advised of his rights. Then the party with Toth in custody proceeded to the Pittsburgh air base arriving at approximately 1700 hours. Toth was taken to the Provost Marshal's Office and the necessary information was obtained from him to fill in forms regarding

the apprehension. His personal items were checked and receipted for and Major Owen asked if he wanted to make any phone calls. Toth made a phone call to his home and informed his family that he had been apprehended by the Air Police and was to be taken to Korea. During the conversation he stated that it was for the same thing about which he was picked up for before. After this pro- [fol. 70] cessing was completed Sgt. Rodriguez and myself were informed by Major Owens that Toth was assigned to us for custody until the plane departed for Korea.

We departed Pittsburgh approximately 2035 hours and arrived at Andrews AFB at 2240 hours. Immediately on landing Toth was taken to the Dispensary and given a complete medical examination. Sgt. Rodriguez and myself and Toth proceeded to the base guardhouse from the Dispensary where Toth was to be quartered until his departure for Korea.

During our stay at the base guardhouse, Toth was made as comfortable as possible and was well fed and cared for at all times. He was given anything he requested. He had cigarettes, writing material, toilet articles and Air Force clothing. He was told he could write letters and did write a letter to his mother. Toth did not seem depressed and slept well.

On the 15th of May, at approximately 0730 hours, Sgt. Rodriguez, Toth and myself departed from Andrews for the Washington International Airport in a government vehicle where Toth was placed in the custody of Captain Jerome in a Government aircraft and we were released of all responsibility for his care and control. At all times when I was in Toth's presence he seemed normal, not depressed or worried about the incidents. He stated that he was well treated by us and shook hands with us when he got on the plane for Korea. At no time was any force of any kind used and at no time did he make any resistance or indicate any lack of cooperation.

William F. Mayers, S/Sgt, AF 20228205.

Subscribed and sworn to before me this 29th day of May, 1953.

Louis F. Alyea, Lt Col, USAF Acting Staff Advocate
Continental Air Command

[fol. 71] AFFIDAVIT

STATE OF NEW YORK
County of Nassau, ss.

Edwin A. Jerome, Captain, USAF, AO 802757, having been duly sworn, deposes and says as follows:

I am an Air Police Officer, assigned as Confinement Officer of the Base Guardhouse, 2500th Air Base Wing, Mitchell Air Force Base, New York. On 12 May 1953 I was notified that I was selected to perform the mission of assisting in the apprehension and return to Korea of civilian Robert W. Toth. I received a letter of instruction from the Air Provost Marshal, Continental Air Command, Mitchel Air Force Base, New York, per letter, Subject: Transfer of Prisoner Robert W. Toth to Commanding General Fifth Air Force, Headquarters Continental Air Command, dated 13 May 1953 and my orders per Letter Order 166, Headquarters Continental Air Command, dated 12 May 1953, true copies attached.

The following is a chronological report of the events that transpired in the apprehension and subsequent return to Korea of Robert W. Toth, in which I participated.

12 May 1953 Eastern Daylight Saving Time

1000—Briefed by Colonel Royal, Continental Air Command Air Provost Marshal and Major Owens at Mitchell Air Force Base, New York.

1530—Received orders and supplemental instructions.

13 May 1953

1030—Departed Mitchel Air Force Base, New York, by C-47, with Major Baggett, Pilot, Major Owen and four Air Policemen: M/Sgt McCreedy, S/Sgt Rodriguez, S/Sgt Mayer and A/1C Menard.

1335—Arrived at Greater Pittsburgh Municipal Airport.

1515—Arrived at Pittsburgh Detachment, OSI Headquarters, and was briefed by the Detachment Commander, Major [fol. 72] McCandless on the final details of the apprehension.

1550—Arrived at Police Department Office of the Jones

and Laughlin Steel Corporation,' 3516 2nd Avenue, Pittsburgh, Pennsylvania.

1600—Lt. Smithey of the Plant Police turned Toth over to Major Owen who placed prisoner under arrest. Major Owen identified himself and asked subject his name and former serial number. Major Owen then read Toth the charges and specifications against him. Article 31, Uniform Code of Military Justice, was then read and explained to Toth by Major Owen.

1610—A wall search was conducted on the prisoner by M/Sgt McCreedy. No weapon was found; all personal property was searched and held.

1615—Subject was handcuffed to A/1C Menard and was transported to Greater Pittsburgh Municipal Airport with Captain Jerome and M/Sgt. McCreedy in a "carry-all." Prisoner was respectful, docile and amenable to instructions.

1640—Arrived at Greater Pittsburgh Airport and proceeded to Air Police Headquarters and the Office of Captain Keller, Air Provost Marshal. Prisoner was interviewed by Captain Jerome, who prepared a DD Form 578 for Major Owen's signature.

1700—A detailed search of the prisoner was made and all his personal property was receipted for on the DD Form 578. Those items of Toth's personal property which he desired to send to his parents were initialed and turned over to Captain Keller, Air Provost Marshal. Captain Keller prepared a hand receipt of those items of property which would be picked up by Toth's parents.

1715—Toth was again advised of his rights under Article 31, Uniform Code of Military Justice, by Major Owen. Toth signed a statement indicating same.

1730—Subject was escorted to the Base Dispensary where he received a preliminary physical examination by the Base Flight Surgeon. Administered medication, ear drops and APC pills for a running ear and slight cold. Flight Surgeon signed certificate stating that subject was physically fit for [fol. 73] trip to Korea. Prisoner appeared in good spirits and maintained a very level head despite his adverse circumstances. No signs of neurosis apparent.

1800—Prisoner returned to Air Provost Marshal' office and requested that the charges, specifications and warrant

be reread to him. Major Owen complied and asked subject if he desired to call a civilian lawyer. Subject declined and stated he would wait to obtain defense counsel at final destination. Prisoner stated to M/Sgt McCreedy and A/1C Menard that he knew the details of the alleged murder. Prisoner stated that Friday is payday and that he had $170.00 back pay accrued. Assured him that his company would keep the money for him; he concurred.

1820—Prisoner returned to Air Provost Marshal office where he was granted a phone call to his parents. Toth talked to his Father and Brother for approximately four minutes. He stated that he was resigned to his fate, that he would return to Korea for trial and that he intended to straighten this matter out himself. He advised his family not to worry, that the outcome would be "OK".

1925—A standard press release was prepared by the Air Provost Marshal office in the event that newspapers demanded a story. Toth stated he did not want the press to have knowledge of his arrest. His desires were respected.

2035—Departed Greater Pittsburgh Municipal Airport with the same crew and passengers plus one prisoner.

2240—Arrived at Andrews Air Force Base, Maryland. Prisoner remained in good spirits. Escorted to the base guardhouse by air police guards and CWO Headricks, Air Police Operations Officer.

2250—Prisoner was confined to protective custody under guard of S/Sgt Rodreguez and S/Sgt Mayer.

2400—Officer and M/Sgt McCreedy and A/1C Menard retired to bed.

14 May 1953

0530—Prisoner awoke; ate a full meal.

[fol. 74] 0600—Washed.

0615—Refused medication. Overall actions and conditions of prisoner appeared to be very good.

0900—Requested pencil and paper to write a letter to Mrs. Nexting Mexez, 220 Dunseith Street, Pittsburgh 13, Pennsylvania. Also stated that he had a good night's sleep.

1200—Toth stated that he was not hungry and refused lunch, but drank a cup of coffee.

1205—Prisoner refused medication. Major Owen censored his letter with permission from Toth.

1000—Captain Jerome coordinated transportation, physical examination and immunization at the Military Air Transport Service Headquarters Building. Priorities and transportation confirmed.

1305—M/Sgt McCreedy and A/1C Menard picked up prisoner at base guardhouse and proceeded to clothing warehouse.

1310—Clothes were issued by 1st Lieutenant R. L. Miller, Clothing Sales Officer, and a copy of sale was retained by Major Owen.

1350—Departed Clothing Sales Store for Dispensary.

1415—Arrived at dispensary. Prisoner was given x-ray, a urine and blood test.

1430—Major Owen asked Toth if he wanted to see the base officer of the Judge Advocate's Department or Chaplain. Prisoner declined. Dr. Morris made out a certificate as to Toth's physical condition for Major Owen. Subject's teeth were checked by Dr. Thomas Holtzman, and seven cavities were found and scaled.

1500—Prisoner, Captain Jerome, M/Sgt McCreedy and A/1C Menard received necessary immunization. No noticeable after effects.

1530—Immunization shots were given to Toth and records turned over to Captain Jerome.

1545—Departed dispensary and proceeded to barber shop. [fol. 75] 1550—Arrived barber shop, and while Toth was getting haircut, Major Owen and M/Sgt McCreedy purchased cigarettes, writing paper, stamps, handerchiefs, magazines for the prisoner and themselves.

1605—Left Barber Shop and PX to base guardhouse.

1615—Arrived base guardhouse where Toth was fed. He ate a hearty meal.

1745—Took shower and changed into issued clothing. Again refused medication.

1800—No significant changes in prisoner. All necessary processing completed as planned.

For the balance of the evening, Toth was turned over to M Sgt McCreedy and A 1C Menard.

2045—Prisoner went to latrine.

2100—Went to bed, fell asleep.

0500—Prisoner awakened, bathed.
0600—Ate full breakfast in guardhouse.
0630—Declined medication, not required, stated that he felt good.
0720—Depart guardhouse, Andrews Air Force Base, with prisoner, Major Owen, Captain Jerome, and four Air Police guards in two vehicles.
0825—Arrived Washington National Airport.
0845—Completed weighing and processing in.
0945—Loaded aircraft, Military Air Transport Service Flight D, 74-15, Navy R6D (DC-6) (C-118A) No. 131662, Pilot: Et Hicks (VR-3 Squadron).
1005—Taxied for take-off. Experienced mechanical trouble; defective #3 engine, returned to ramp.
1105—Take off from Washington National Airport effected after 1 hour delay.
1500—Served in-flight lunch. Prisoner ate everything. Very smooth flight. ETA 2130 EDST 1830 PDST, Travis Air Base, California.
[fol. 76] 1805—Pacific Daylight Saving Time—Arrived at Travis.
1900—Prisoner taken to base guardhouse, Fifth Air Police Squadron Retraining Center.
1915—Captain Jerome processed records and arranged a flight to Japan. Good cooperation and support was given from Military Air Transport Service personnel.
2000—Captain Jerome sent wire to Continental Air Command, information: Far East Air Force, Fifth Air Force.
2050—Both ate full meal which was cold. He made no comments. After chow, he washed and shaved, went to latrine.
2150—Return to cell fell asleep.
2345—Prisoner awakened; departed guardhouse for Military Air Transport Service terminal.
2400—Luggage weighed in and checked, awaited loading in "Protocol" Lounge. No one has had contact with prisoner.

16 May 1953

0645—Loaded aboard aircraft ahead of other passengers.

0745—Take off, routine, very smooth flight aboard PAA Flight 331 16 Aircraft #8927. Pilot: Mr. Cootz. Estimated time enroute to Honolulu International Airport 11½ hours.

0800—Everyone awake after comfortable nap. Prisoner ate cold box lunch; he remained in high spirits.

1100—Arrived Honolulu International Airport, Oahu, Territory of Hawaii, (Territory of Hawaii Time)

1130—Hot meal was served at Airport restaurant by PAA.

1200—Allowed prisoner to write two post cards. Nothing significant contributed. Prisoner commented on the good treatment he is receiving. Remained in VIP lounge with prisoner.

1330—Boarded same aircraft.

1400—Departed take off Honolulu time.

1430—Toth began sleeping.

[fol. 77] 1600—He fell asleep.

1905—Toth awoke.

2050—Crossed International Date Line (Gained one day).

17 May 1953 Wake Island Time

2250—Arrived Wake Island, boarded bus to mess hall. Prisoner stated he was not hungry. Had tomato juice and coffee.

2330—Went to local PX, purchased cigarettes for him.

2400—Boarded same aircraft—Wake Island Time.

18 May 1953

0005—Experienced mechanical difficulty, before take off.

0010—Deplaned awaiting mechanical difficulty correction.

0015—Take off, departed Wake Island. Estimated time enroute, 10 hours.

0130—Prisoner fell asleep.

0700—Prisoner awakened, ate full meal. Continues to be stable and has good morale. Estimated Time of Arrival at Haneda Airport, Tokyo is 2300Z GMT 17 May. One hour longer than proposed ETA (Estimated Time of Arrival). Sent in wire at Travis Air Force Base, California.

0840—Tokyo Time. Landed at Haneda Airport.

0900—Confined prisoner at local Air Police detention facility. Good cooperation from Major Murphy, Haneda Air Force Base Provost Marshal. Prisoner took shower and shaved. Captain Jerome made arrangements to immediately depart on a scheduled Far East Air Force aircraft bound for K-2 Air Base, Taegu, Korea.

1005—Departed Haneda aboard C-47 #6644 routine flight. Several very important people aboard.

1510—Landed at K-2, prisoner escorted to Fifth Air Force Correction Center.

1600—Prisoner delivered to T. Sgt Josephenson, NCOIC, Correction Center. Prisoner receipted for by 2nd Lieutenant Warren White.

1750—Reported to Lt Colonel Harris, Air Provost Marshal, Fifth Air Force for briefing. All necessary details and documents delivered. Mission completed.

[fol. 78] During the period of time that he was in my presence Robert W. Toth was respectful and obedient. He offered no resistance whatsoever and his conduct was above reproach.

Attached to this affidavit are true copies of the following documents:

1. Letter of instructions; subject: Transfer of Prisoner Robert W. Toth to Commanding General Fifth Air Force, dated 13 May 1953.

2. Letter Order 166, Headquarters Continental Air Command, dated 12 May 1953.

3. Receipt for prisoner, WD AGO Form 19-74, dated 18 May 1953.

Edwin A. Jerome, Capt, USAF, AO 802757

Subscribed and sworn to before me this 29th day of May 1953. Louis F. Alyea, Lt Col: USAF Acting Staff Judge Advocate Continental Air Command.

[fol. 79] HEADQUARTERS

CONTINENTAL AIR COMMAND

Mitchel Air Force Base, New York

PM 261-TOTH, R. W. 13 May 1953

Subject: Transfer of Prisoner Robert W. Toth to Commanding General Fifth Air Force

To: Captain Edwin A. Jerome, AO 802757, 2500th Air Base Group, Mitchel Air Force Base, N. Y.

1. You will proceed on 13 May 1953 to Pittsburgh, Pennsylvania, together with M Sgt Charles E. McCreedy and A/1C Albert R. Menard, and such other personnel as may be required, to assist Major George S. Owen, this headquarters, in effecting the apprehension of former A/1C Robert W. Toth. Major Owen will be the officer charged with the responsibility of the prisoner until delivery is made to you at the MATS terminal at Washington International Airport.

2. Upon delivery to you, you are responsible for the safe delivery of the prisoner into the custody of the Commanding General, Fifth Air Force (Rear), with the least practicable delay.

3. You are authorized to use any legal means of restraint, including handcuffs, to insure that the prisoner does not escape or do physical harm to himself or to others.

4. Any unusual occurrences or undue delays incident to the delivery of the prisoner will be reported by message to this headquarters.

5. When a reasonably firm ETA at Fifth Air Force Headquarters (Rear) has been established, that headquarters will be so notified.

6. Upon completion of delivery of the prisoner into the custody of the Commanding General, Fifth Air Force, you will effect delivery of the letter from the Secretary of the Air Force with 1st Indorsement by Headquarters USAF and 2nd indorsement by this headquarters to the Commanding General, Far Eastern Air Force, Tokyo, Japan.

By command of Lieutenant General Johnson:

(S.) John J. Leonard, Major, USAF, Asst Adjutant General

Certified True Copy, Louis F. Alyea, Lt Col, USAF, Acting Staff Judge Advocate, Continental Air Command.

(Here Follows 1 Photograph, Side Fol. 80)

he was under arrest by direction of the Secretary of the Air Force.

I then read Toth the charges and specifications, the Secretary's letter ordering him apprehended and returned to Korea for trial by court-martial and advised him of his rights under Article 31 of the Uniform Code of Military Justice.

M/Sgt McCreedy then conducted a routine search for concealed weapons on Toth. Nothing was found. Toth did not resist the apprehension or the search. We departed the Jones & Laughlin Steel Corporation Plant at 1610 hours and arrived at Greater Pittsburgh Airport at 1640 in two OSI vehicles. Toth rode in the first vehicle with Captain Jerome, Sgt Menard and Sgt McCreedy. He was immediately taken to the Base Provost Marshal's Office, where Captain Jerome obtained all necessary information for DD Form 578, Incident Report, (copy attached), Inclosure 1, which Toth answered without objection. He signed two copies of form titled, "Uniform Code of Military Justice, Article 31, Compulsory Self-Incrimination Prohibited", (Photostat attached), Inclosure 2.

I again read to Toth the Secretary's letter, the charges and specifications and advised him of his rights under Article 31 of the Uniform Code of Military Justice. When Toth said that he could not understand how he could be returned to Air Force control since he was a civilian, I read Article 3a, Uniform Code of Military Justice to him. After reading Article 3a, I asked him if he would like it explained in simple language and he said no, he completely understood it. I advised him that he would have an opportunity to [fol. 85] telephone his parents and a civilian lawyer if he so desired prior to departure from Pittsburgh. Toth was given a receipt for the personal property he decided to leave behind and which he later requested, by telephone, that his step-father, Mr. Mertz, pick up for him at the Base Provost Marshal's Office. I have a receipt, signed by Mr. Mertz, for this property. Those present during the period at the Provost Marshal's Office were the four Air policemen, Captain Jerome, Captain Bernard B. Keller, Base Provost Marshal, one OSI Agent whose name is unknown, and myself.

At 1715 hours, Toth was taken to the Base Dispensary

RECEIPT FOR PRISONER

CASE NUMBER	DATE
[redacted]	18 May 1953

UNIT	LOCATION	RECORD OF ARREST NUMBER
2500th Air Base Wing	Mitchel AFB, New York	N/A

NAME (Last, first, middle initial)	ARMY SERIAL NUMBER	GRADE	ORGANIZATION
TOTI, Robert W.	Civilian	N/A	N/A

OFFENSE

Article 81 and 113. Charged with premeditated murder. Appronension and return to Headquarters, Fifth Air Force (Rear) directed by the Secretary of the Air Force.

I ACKNOWLEDGE RECEIPT OF THE ABOVE NAMED PRISONER AND CERTIFY THAT I AM AUTHORIZED TO RECEIVE THE PRISONER INTO MY CUSTODY

TIME	SIGNATURE	GRADE	ARMY SERIAL NUMBER
1600 hours	[redacted] Hall, 2nd Lt, USAF, Conf Officer	2nd Lt.	AO 2 219 402

DATE	ORGANIZATION	STATION
18 May 1953	Fifth Air Force Correction Center	K-2 Air Base, APO 970

WD AGO 19-74

where he received a physical examination given by the Flight Surgeon. At this time his clothing was further searched for concealed weapons by Airman Menard. Captain Jerome, Captain Keller, Sgt McCreedy and myself were present during the physical examination. No objection was made by Toth. I received a health certificate from the Flight Surgeon certifying that Toth was physically able to travel by any means.

Toth was returned to the Provost Marshal's Office. For the third time I read the Secretary's letter, the charges and specifications, Article 31 of the Uniform Code of Military Justice and Article 3a of the Uniform Code of Military Justice to Toth. I again asked him if he desired to contact a civilian lawyer, to which he stated he did not and would wait to have Defense Counsel appointed in Korea. Toth was turned over to S/Sgt Mayers and S/Sgt Rodriguez at 1820 hours. Toth messed in the 500th Air Defense Group Mess, Greater Pittsburgh Airport at 1800 hours and ate a hearty meal.

At 1920 hours, Toth telephoned his home from Captain Keller's office. He had been told that he would have a reasonable length of time for a conversation and that the call would not be censored. His mother answered the telephone and he asked to speak to his step-father. He told his step-father he had been arrested at work and was being returned [fol. 86] to Korea under military escort for trial, that he did not want the press to have any knowledge of what happened. He told his step-father to tell his mother not to worry about it and that he would be back in about a week. He completed the telephone call at 1925 hours. I asked Toth if he wished to telephone anyone else and he said no, he did not.

Toth and the military personnel boarded the airplane immediately. After sometime awaiting clearance for take-off at the airport, we were airborne at 2035 hours. I told Toth our destination was Andrews Air Force Base where he would remain until Friday morning. During the flight he slept in a reclining chair. We arrived at Andrews Air Force Base, Washington, D.C. at 2240 hours. Toth was turned over to Chief Warrant Officer Hendricks, Air Police Operations Office of the 1401st Air Police Squadron, at 2250 hours for protective custody.

On the morning of 14 May, I asked Toth if he was comfortable, if he had enough to eat and whether he would like to write any letters. He replied that he was more than comfortable. In fact, he said he was getting better treatment than he received at home, that he had more than enough to eat. He only wrote one letter, which was addressed to his mother. I gave him the stamp for the letter and personally mailed it at the National Airport in Washington, D.C., on 15 May, at 1000 hours in an official Post Office Box. Toth expressed concern that his case might be publicised and that he wouldn't be able to live in Pittsburgh thereafter.

On the morning of 14 May I conferred with the Base Provost Marshal and the Base Commander concerning the issuance of clothing and equipment to Toth and arranged for a complete physical examination and necessary immunizations. At 1300 hours, Toth was taken to the Clothing Sales Store at Andrews Air Force Base and issued a complete uniform allowance, less insignia, under the provisions of paragraph 11e, Air Force Regulation 125-33. Toth was supplied with a Red Cross Kit of toilet articles and shaving [fol. 87] equipment, cigarettes, handerchiefs and reading material at no expense to the government. Toth was then taken to the Base Hospital where he was given a complete physical examination by Captain Douglas C. Morris, Flight Surgeon. Captain Morris furnished me with a certificate certifying that Toth had been examined, that he was found free of communicable diseases, laboratory findings were negative, no evidence of upper respiratory infection and that in his opinion Toth was able to travel by any conveyance deemed necessary. (Photostat attached, Incl. 3.) Toth made no objection to being examined. At the hospital I asked Toth if he would like to see an officer of the Judge Advocate General's Department or a Chaplain and he said no; that his mother would do his praying and the Air Force could take care of the lawyer. Toth was then returned to the Base Guardhouse.

On 15 May, Toth and the military personnel left Andrews Air Force Base by military vehicle at 0730 hours and arrived at Washington National Airport at 0815 hours. Toth was immediately taken to the VIP Waiting Room where he re-

[fol. 81]

HEADQUARTERS

CONTINENTAL AIR COMMAND

Mitchel Air Force Base, New York

LETTER ORDERS: 166 — 12 May 1953

Subject: Temporary Duty Orders

To: Those Concerned

1. The fol-named Off & amn; 2500th AB Gp, this sta WP Pittsburgh, Pa; Washington, DC; Korea o/a 16 May 53 on TDY aprx twenty (20) days to apprehend Robert W Toth and ret him to the CG, Fifth AF (Rear) Korea, DPUO. Upon compl of TDY will ret proper sta. Air Movement Designator NW-US-1D-0248-RF5. AFM 35-6 w/b complied with and imm IAW AFR 160-102 w/b accomplished immed. Degree of Clearance for the pd of this order only-Secret. Tvl by mil or coml acft, coml rail and/or bus authd. TBGAA. CIPAP. TDN 5733500 348-102 P593-02-03-07 S99-999. (BA# 1030) (Auth: 1st Ind, Ltr Hq USAF, AFCPM-2, 30 Apr 53).

Captain Edwin A Jerome A0802757 USAF
M Sgt Charles E McCreedy AF 20203642
A/1C Albert R. Menard AF 6145681

By Command of Lieutenant General Johnson:
(S.) Leonard Giaimo, Capt., USAF, Asst. Adj Gen

Distribution:
10-Ea Off & amn concerned
3-CO, 2500th AB Gp, Mitchel AFB, NY
1-VC
1-BA
1-CO, Hq Sq Sec ConAC, Mitchel AFB, NY

Certified True Copy: Louis F. Alyea, Lt Col, USAF, Acting Staff Judge Advocate, Continental Air Command.

mained until 0930. Accompanied by M/Sgt McCreedy and A/1C Menard and Captain Jerome, he boarded MATS aircraft No. 131602, Flight 74-15 for a non-stop flight to Travis Air Force Base. At this time I turned him over to the control of Captain Jerome.

During the complete time that Toth was in my presence, he offered no resistance by word or action. At no time was force or threat of any nature used against Toth. As I left Toth upon putting him aboard the aircraft at Washington National Airport, he thanked me for the considerate treatment he had received while under my command.

George S. Owen, Major, USAF, AO 570.927

Subscribed and Sworn to Before Me this 29th day of May 1953. Louis F. Alyea, Lt Col., USAF Acting Staff Judge Advocate Continental Air Command.

OFFENSE OR INCIDENT REPORT

CASE NUMBER

HEADQUARTERS: Headquarters, ConAC, Mitchel AFB, New York

LOCATION: Hempstead, New York

TO: Commanding General, Mitchel Air Force Base, New York

DATE: 13 May 1953

1. NAME OF OFFENDER	2. GRADE	3. SERVICE NUMBER	4. ORGANIZATION
Robert W. TOTH (Civilian)	Former A/1C	AF 13313030	Formerly 543d Security Police Sq APO 970, c/o PM San Francisco, Cal.

5. OFFENSE OR INCIDENT (*Specify offense or type of incident*)

Apprehension of subject civilian on orders received from the Secretary of the Air Force.

6. PLACE AND/OR ADDRESS OF INCIDENT

Apprehended at the Police Dept Office of the Jones & Laughlin Steel Corporation, Pittsburgh Works at 3516 2d Ave. Pittsburgh, Pa

7. HOUR: 1600 hours Eastern Daylight Saving Time

8. DATE: 13 May 1953

9. REPORTED BY (*Name, Grade and Service No. if applicable*)	10. ADDRESS	11. TELEPHONE NUMBER
Secretary of the Air Force	Dept of the Air Force, Washington D.C.	

12. COMPLAINT RECEIVED BY/FROM Dept of the Air Force

☒ LETTER ☐ PERSON ☐ TELEPHONE ☐ CIVIL POLICE ☐ SERVICE POLICE

13. BASIS FOR APPREHENSION	14. APPREHENDING AGENCY	15. VOLUNTARY SURRENDER
☒ ON COMPLAINT ☐ ON VIEW	☐ CIVIL POLICE ☒ SERVICE POLICE	☐ CIVIL POLICE ☐ SERVICE POLICE N/A

16. HOW DRESSED (*Civilian or military and condition of clothing*)

Civilian working clothes Race: Caucasian Age: 21 MARRITAL STATUS: Single

17. DETAILS OF OFFENSE OR INCIDENT

Subject is charged with premeditated murder committed while stationed in Korea.

Orders directing his apprehension and subsequent return to Korea were received from the Department of the Air Force per Letter, Dept of the Air Force, Subject: Return of Robert W. Toth (Former A/1C, AF 13313030); Trial by Court Martial dated April 30, 1953 and amendments thereto.

Subject will be returned to Korea by authority contained in Letter Order 166, Hq ConAC dated 12 May 1953. Estimated time of departure from ZI will be e/a 16 May 1953.

Information concerning subject:

Date of Birth: 8 Dec 1931
Home Address: 220 Dunseith Street, Pittsburgh 13, Pennsylvania
Home Phone: Schenley 1-7231

6. PLACE AND/OR ADDRESS OF INCIDENT

Apprehended at the Police Dept Office of the Jones & Laughlin Steel Corporation, Pittsburgh Works at 3516 2d Ave. Pittsburgh, Pa

7. HOUR: 1600 hours Eastern Daylight Saving Time

8. DATE: 13 May 1953

9. REPORTED BY (*Name, Grade and Service No. if applicable*): Secretary of the Air Force

10. ADDRESS: Dept of the Air Force, Washington D.C.

11. TELEPHONE NUMBER

12. COMPLAINT RECEIVED BY/FROM Dept of the Air Force

☒ LETTER ☐ PERSON ☐ TELEPHONE ☐ CIVIL POLICE ☐ SERVICE POLICE

13. BASIS FOR APPREHENSION: ☒ ON COMPLAINT ☐ ON VIEW

14. APPREHENDING AGENCY: ☐ CIVIL POLICE ☒ SERVICE POLICE

15. VOLUNTARY SURRENDER: ☐ CIVIL POLICE ☐ SERVICE POLICE N/A

16. HOW DRESSED (*Civilian or military and condition of clothing*)

Civilian working clothes Race: Caucasian Age: 21 MARRITAL STATUS: Single

17. DETAILS OF OFFENSE OR INCIDENT

Subject is charged with premeditated murder committed while stationed in Korea.

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Information concerning subject:

Date of Birth: 8 Dec 1931
Home Address: 220 Dunseith Street, Pittsburgh 13, Pennsylvania
Home Phone: Schenley 1-7231

Incl 1

DD FORM 1 SEP 51 578 REPLACES WD AGO FORM 19-71, 1 SEP 46, WHICH IS OBSOLETE

[fol. 82] AFFIDAVIT

STATE OF NEW YORK
County of Nassau, ss:

GEORGE S. OWEN, Major, USAF, AO 570 927, having been duly sworn, deposes and says as follows:

I am the Assistant Provost Marshal of Continental Air Command, Mitchel Air Force Base, New York. I received an initial warning on 30 April 1953 by telephone from Colonel Stevenson of the Air Provost Marshal's Office, Headquarters USAF, which revealed that this command would be directed to apprehend a civilian who was a former airman accused of an offense under the Uniform Code of Military Justice. I was directed to start planning for the apprehension and advised that written instructions would be forthcoming from Headquarters USAF.

At 1600 hours, 6 May 1953, the Secretary's letter, charge sheets, and 1st Indorsement to this headquarters from the Department of the Air Force, Headquarters, USAF, signed by Major General Joseph V. Dillon, the Air Provost Marshal, were received. The subject of the Secretary's letter was: Return of Robert W. Toth, (former A/1C, AF 13 313 030); Trial by court-martial. Address was 220 Dunseith Street, Pittsburgh, Pennsylvania.

On 7 May 1953, I was ordered by par 2, Letter Orders 159, Headquarters ConAC, 7 May 1953, to proceed to Pittsburgh, Pennsylvania, for the purpose of planning the apprehension of Robert W. Toth. On 8 May 1953, I contacted Special Agent Park R. McCandless, OSI Detachment Commander in Pittsburgh and with him conferred with Captain Nicholson, Chief of Plant Protection, Jones & Laughlin Steel Corporation, where Toth was employed. It was agreed in conference with the aforementioned persons that Toth would be taken into custody by the plant police and turned over to my control at a time to be determined later. I then returned to this station arriving on 9 May 1953.

[fol. 83] On 11 May 1953, a conference was held with Major General Hall, the Vice Commander of Continental Air Command, Colonel Quirk, Assistant Vice Commander, Colonel Schweikhardt, Staff Judge Advocate, Lt Colonel Alyea,

CHARGE SHEET

PLACE: Hq., 75th Air Depot Wing, APO 970, c/o Postmaster, San Francisco, California

DATE: 24 MAY 1953

ACCUSED (Last Name, First Name, Middle Initial) (Last entry when material.): TOTH, Robert W.

SERVICE NUMBER: AF 13 313 030

RANK OR GRADE: Civilian, formerly Airman First Class

ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.): 220 Dunsmith Street, Pittsburgh, Pennsylvania, A civilian subject to the Uniform Code of Military Justice under Article 3a.

DATE OF BIRTH:

CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 126h (2)):

PAY PER MONTH

BASIC $

SEA OR FOREIGN DUTY $

TOTAL $

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE: Honorably Discharged 8 December 1952

TERM OF CURRENT SERVICE:

PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.):

DATA AS TO WITNESSES

NAME OF WITNESS	ADDRESS	WITNESSES FOR PROSECUTION	WITNESSES FOR ACCUSED
Willard K. Carpenter, A/2C AF 16 410 247	3400th Air Police Squadron, Francis E. Warren Air Force Base, Wyoming	X	
Bobby L. Holcomb, A/2C AF 14 390 964	3629th Student Squadron, Air Base Defense, Parks Air Force Base, California	X	

Willard K. Carpenter, A/2C AF 16 410 247	3400th Air Police Squadron, Francis E. Warren Air Force Base, Wyoming	X	
Bobby L. Holcomb, A/2C AF 14 390 964	3629th Student Squadron, Air Base Defense, Parks Air Force Base, California	X	

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE. IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND.

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION
Confined	18 May 1953	K-2 Air Base, APO 970

DD FORM 1 MAR 51 458

1 REPLACES DA AGO FORM 115, 1 DEC 48 WHICH IS OBSOLETE

Assistant Staff Judge Advocate, Lt Colonel Royal, Air Provost Marshal, and myself in the Vice Commander's Office, Continental Air Command, at which time the plan for the apprehension was discussed and approved. I then telephoned Special Agent McCandless on 11 May 1953 who confirmed that Toth would be at work on the afternoon of 13 May 1953; that transportation and assistance would be supplied by the OSI and that Captain Nicholson, Chief of Plant Protection, would be apprised of our plans. On the afternoon of 11 May 1953, the final plan for the apprehension of Toth was submitted to the Commanding General and the Vice Commander, Continental Air Command, and was approved.

I left Mitchel Air Force Base by military aircraft at 1030 hours, 13 May 1953, accompanied by Captain Edwin Jerome, M/Sgt Charles McCreedy, S/Sgt Caesar A. Rodriguez, S/Sgt William F. Mayers and A/1C Albert E. Menard. We arrived at Greater Pittsburgh Airport, Pennsylvania at 1335 hours. The Base Provost Marshal, Headquarters 500th Air Defense Group, was advised of our duty, and he provided transportation to the OSI Detachment in Pittsburgh, where we arrived at 1515 hours and conferred with Special Agent McCandless of the OSI Detachment. About five minutes after our arrival, at 1520 hours, Captain Nicholson of the Jones & Laughlin Plant Police, telephoned to say that Toth had been detained at the plant.

Accompanied by the personnel mentioned above plus Special Agent McCandless and 2 other OSI agents, who were unknown to me, we departed for the Jones & Laughlin Steel Plant where Toth was employed. We arrived at 1550 hours at the plant which was located at 3516 Second Avenue, Pittsburgh, Pennsylvania, and were immediately escorted by Lt. M. W. Smith to his office where Toth was being detained by Corporal James T. Mander, Jr.. The lieutenant and [fol. 84] the corporal were plant police. The time was 1600 hours. I was in Air Force uniform and immediately identified myself to Toth as a Major in the United States Air Force. I asked Toth his name and former Air Force Serial Number. He said, "I am Robert W. Toth", and gave his correct serial number. Lt. Smith and Corporal Mander were present, plus one unknown OSI Agent, M/Sgt McCreedy, Sgt Menard, Toth and myself. I immediately told Toth

NAMES OF INDIVIDUALS REQUIRING MEDICAL ATTENTION (Attach medical reports, if prepared)

17 1/2 cs

Routine physical exam; see attached report

19. NAME, ADDRESS, AND TELEPHONE NUMBER OF DOCTOR OR OTHERS RENDERING FIRST AID

N/A

20. WITNESSES (Attach copy of statements given by witnesses)

NAME	ADDRESS	TELEPHONE
Lt. M.W. Smith Plant Police	J & L Pittsburgh Works 2707 Carson St. Pittsburgh, Pa	
Cpl James T. Mander	J & L Pittsburgh Works 2707 Carson St. Pittsburgh, Pa	

21. APPREHENDING PERSONNEL

NAME	GRADE	SERVICE NUMBER	ORGANIZATION
G.S. Owen	Major	AO 570927	Hq, ConAC
Charles E. McCreedy	M/Sgt	AF 20203642	2500th Air Police Sq
Albert R. Menard	A/1C	AF 6145681	2500th Air Police Sq

22. EVIDENCE

None; Personal Property Receipt attached.

Cpl James T. Mander	J & L Pittsburgh Works 2707 Carson St. Pittsburgh, Pa	

21. APPREHENDING PERSONNEL

NAME	GRADE	SERVICE NUMBER	ORGANIZATION
G.S. Owen	Major	AO 570927	Hq, ConAC
Charles E. McCreedy	M/Sgt	AF 20203642	2500th Air Police Sq
Albert R. Menard	A/1C	AF 6145681	2500th Air Police Sq

22. EVIDENCE

None; Personal Property Receipt attached.

23. DISPOSITION OF EVIDENCE

N/A Personal property to accompany prisoner.

24. DISPOSITION OF OFFENDER

To be returned to CG, Fifth Air Force (Rear) Korea

TYPED NAME, GRADE, AND ORGANIZATION OF COMMANDING OFFICER	SIGNATURE
GEORGE S. OWEN, Major, Hq, ConAC	George S. Owen

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☆ U.S. GOVERNMENT PRINTING OFFICE 1951 O—887189

Encl 1

UNIFORM CODE OF MILITARY JUST

Article 31. Compulsory self-incrimination prohibited.

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense, without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

STATEMENT

Sections (a) and (b) of Article 31 of the Uniform Code of Military Justice have been read and explained to me, and I fully realize and understand the contents thereof and my rights thereunder.

~~I have been AWOL without leave from my organization~~ _____
_____ at _____
(Organization) (Post, Camp, or Station)
~~since on or about~~ _____ 195__.

This ~~statement~~ is made by me voluntarily and I have full knowledge that it may be used ~~against me~~. I understand and realize that impersonating a member of the Military Service is punishable under Federal Law.

13 May 52 1600 Robt W. Tatk
Date Time Signature of EM, WO or Officer

STATEMENT

Sections (a) and (b) of Article 31 of the Uniform Code of Military Justice have been read and explained to me, and I fully realize and understand the contents thereof and my rights thereunder.

~~I have been AWOL without leave from my organization~~ _____
_____ at _____
(Organization) (Post, Camp, or Station)
~~since on or about~~ _____ 195__.

This ~~statement~~ is made by me voluntarily and I have full knowledge that it may be used ~~against me~~. I understand and realize that impersonating a member of the Military Service is punishable under Federal Law.

13 May 52 1600 Robt W. Tatk
Date Time Signature of EM, WO or Officer

_____
Rank, Service No. and Arm or Sv.

Sections (a) and (b) of Article 31 of the Uniform Code of Military Justice were read and explained to the enlisted man, Warrant Officer or Officer, whose signature appears above, and his signature witnessed.

[illegible]
Name of Witness

M/Sgt. AF 23803642 USAF
Rank, Service No. and Arm or Sv.

250th Air Police Sq
Organization

[illegible]
Name of Person Reading and Explaining Article 31

[illegible] AF19927 USAF
Rank, Service No. and Arm or Sv.

[illegible]
Organization

ADDITIONAL CHARGE

Charge : Violation of the Uniform Code of Military Justice, Article [redacted]

Specification : In that Robert W. Toth, a civilian subject to the Uniform Code of Military Justice under Article 2a, then an Airman First Class, United States Air Force, assigned to the 5434 Ammunition Supply Squadron Depot, 79th Air Depot Wing, APO 970, did at or near K-9 Air Base, APO 970, on or about 27 September 1952, commit an assault upon Bang Soon Kil, a male Korean national, by striking him on the head and face with a pistol and did thereby intentionally inflict grievous bodily harm upon him, to wit: a deep cut.

If this space is insufficient for all charges and specifications, they will be set forth numerically, front to back, on separate sheets attached to this page.

[redacted]

SIGNATURE OF ACCUSER	RANK	ORGANIZATION
[redacted]	Colonel, USAF	Hq 79th Air Depot Wing

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 24th day of May, 19 53, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

Ben Taylor
SIGNATURE

Lt Colonel, USAF, Hq 79th Air Depot Wing
RANK AND ORGANIZATION OF OFFICER ADMINISTERING OATH

[redacted]
OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. SEE PARAGRAPH 29e, MCM, 1951, AND ARTICLES 30a AND 136.

Officer administering oath must be a commissioned officer.

24 May 1953
DATE

I have this date informed the accused of the charges against him.

Warren White — 2d Lt 6157th Air Base Sqd (CC)
SIGNATURE — RANK AND ORGANIZATION

Headquarters, 79th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif. 24 May 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1300 hours, this date.

FOR THE COMMANDING [illegible]
Ben Taylor
[redacted], Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

I have this date informed the accused of the charges against him.

Warren White — 2d Lt 6157th Air Base Sqd (CC)
SIGNATURE — RANK AND ORGANIZATION

Headquarters, 79th Air Depot Wing, APO 970, c/o PM, San Francisco, Calif. 24 May 1953
DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION — PLACE — DATE

The sworn charges above were received at 1300 hours, this date.

FOR THE COMMANDING [illegible]
Ben Taylor
[redacted], Lt Col, USAF, Adjutant
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

DESIGNATION OF COMMAND OF CONVENING AUTHORITY — PLACE — DATE

Referred for trial to the _____ court-martial appointed by _____

_____, _____, 19___, subject to the following instructions: [2] _____.

BY [1] _____ of _____
COMMAND OR ORDER

SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

I have served a copy hereof on each of the above-named accused, this _____ day of _____, 19___.

SIGNATURE — RANK AND ORGANIZATION OF TRIAL COUNSEL

[1] When an appropriate commander signs personally, inapplicable words are stricken out. [2] Relative to proper instructions which may be included in the indorsement of reference for trial, see par. 33j(1), MCM, 1951. If none, so state.

87

OFFICE OF THE FLIGHT SURGEON
ANDREWS AIR FORCE BASE
WASHINGTON 25, D. C.

14 May 1953

C E R T I F I C A T E

This is to certify that ROBERT W. TOTH was examined by the undersigned this date and found free of communicable disease. Laboratory findings are negative. No evidence of upper respiratory infection. In my opinion the patient is able to travel by any conveyance deamed necessary.

Douglas C. Morris

DOUGLAS C. MORRIS
CAPTAIN, USAF MC
FLIGHT SURGEON

Fill in blank with numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate. For use unless departmental regulations prevent such election.

THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

RANK AND ORGANIZATION OF OFFICER EXERCISING JURISDICTION UNDER ARTICLE 15	SIGNATURE

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NO.. *(Inserted by convening authority)*

TO BE FILLED IN BY THE ACCUSED

1 ☐ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL	SIGNATURE OF ACCUSED

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE

When an accused has been permitted and has elected to refuse punishment under Article 15, trial by summary court-martial may proceed despite his objection.

1. THE ACCUSED, HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL AND NOT HAVING BEEN PERMITTED TO REFUSE PUNISHMENT UNDER ARTICLE 15, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED
PLACE			DATE

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79d, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED
PLACE			DATE

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

Enter after signature, "Only officer present with command," if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY

ORGANIZATION	PLACE	DATE

ACTION OF CONVENING AUTHORITY

RANK AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE , COMMANDING

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION.

RANK AND DESIGNATION OF OFFICER RESPONSIBLE FOR THE ACCUSED'S RECORDS	SIGNATURE

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on

*U. S. GOVERNMENT PRI

H.C.68-53

United States of America

FILED
JUN 25 1953
HARRY M. HULL, Clerk

DEPARTMENT OF THE AIR FORCE

Washington, D.C. 19 June , 19[illegible] 53
(Place) (Date)

I HEREBY CERTIFY that the attached are photostatic copies of duplicate originals of the following: affidavit of Brigadier General Bert K. Johnson, Staff Judge Advocate, Far East Air Forces, dated 13 June 1953; electrical communication from the Secretary of the Air Force to Mr. Anthony H. McGrath, Room 417, Fukuhn Building, Tokyo, Japan, dated 18 June 1953; letter from Mr. Anthony H. McGrath to the Secretary of the Air Force, dated 11 June 1953; and electrical communication from Commanding General, Far East Air Forces, to Headquarters, United States Air Force, dated 13 June 1953. Duplicate originals of the attached copies are on file in the Office of The Judge Advocate General, USAF.

/s/ Albert M. Kuhfeld

ALBERT M. KUHFELD
Brigadier General, USAF
Acting The Judge Advocate General, USAF

I HEREBY CERTIFY that Brigadier General Albert M. Kuhfeld , who

[illegible]

[illegible]

Washington, D.C. 19 June , 19[illegible] 53
(Place) (Date)

I HEREBY CERTIFY that the attached are photostatic copies of duplicate originals of the following: affidavit of Brigadier General Bert K. Johnson, Staff Judge Advocate, Far East Air Forces, dated 13 June 1953; electrical communication from the Secretary of the Air Force to Mr. Anthony H. McGrath, Room 417, Fukuhn Building, Tokyo, Japan, dated 18 June 1953; letter from Mr. Anthony H. McGrath to the Secretary of the Air Force, dated 11 June 1953; and electrical communication from Commanding General, Far East Air Forces, to Headquarters, United States Air Force, dated 13 June 1953. Duplicate originals of the attached copies are on file in the Office of The Judge Advocate General, USAF.

/s/ Albert M. Kuhfeld

ALBERT M. KUHFELD
Brigadier General, USAF
Acting The Judge Advocate General, USAF

I HEREBY CERTIFY that Brigadier General Albert M. Kuhfeld , who signed the foregoing certificate, is the Acting The Judge Advocate General, United States Air Force , and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, HAROLD K. TALBOTT,
Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this 19th day of June, 19[illegible] 53

(seal)

Harold K. Talbott
Secretary of the Air Force

By Philip J. Carroll
Administrative Assistant

AF FORM 44 COPY WF-O-12 [illegible] 30M

ROUTING

JOINT MESSAGEFORM

COMMUNICATIONS CENTER NO. CJA

SPACE ABOVE FOR COMMUNICATIONS CENTER ONLY

FROM: (Originator)

HQ USAF

DATE-TIME GROUP: 18 JUN 1953

SECURITY CLASSIFICATION: UNCLASSIFIED

PRECEDENCE FOR: ACTION: PRIORITY | INFORMATION: PRIORITY

BOOK MESSAGE ☐ ORIGINAL MESSAGE

MULTIPLE ADDRESS ☐ CRYPTOPRECAUTION YES ☐ NO ☐

REFERS TO MESSAGE

IDENTIFICATION | CLASSIFICATION

TO: Mr. Anthony R. McGrath
Room 417, Feinstein Building
Tokyo, Japan

INFO: Staff Judge Advocate
FEAF TOKYO JAPAN

44962

In reply to your letter and cable of 11 June 1953, you are advised that proper administration of military justice requires that the Toth case, if referred for trial under Article 34 of the Uniform Code of Military Justice, be tried in Korea. Brigadier General Johnson, Staff Judge Advocate, FEAF, has advised that ample qualified and competent counsel are available in the Far East Air Forces for appointment as defense counsel. Johnson advised you that in the event the accused desires military counsel other than those

proper administration of military justice requires that the Toth case, if referred for trial under Article 34 of the Uniform Code of Military Justice, be tried in Korea. Brigadier General Johnson, Staff Judge Advocate, FEAF, has advised that ample qualified and competent counsel are available in the Far East Air Forces for appointment as defense counsel. Johnson advised you

that in the event the accused desires military counsel other than those heretofor appointed he may make request therefor as provided by the Manual for Courts-Martial, United States, 1951. The Air Force facilitated your departure for Tokyo and made possible your travel between Tokyo and Korea on the basis of understanding you were going to represent accused. In the event you represent accused in the trial, the appointed defense counsel and assistant defense counsel will be available to act as associate counsel if accused desires.

This message directed by the Office of The Secretary of the Air Force.

HAROLD E. TALBOTT
SECRETARY OF THE AIR FORCE

AFCJA-22 Col Ward | AFCJA-20 Brig Gen Kuhfeld | OSAF Col W.G. Hipps

SECURITY CLASSIFICATION: UNCLASSIFIED | PAGE 1 OF 1 PAGES

DRAFTER'S NAME (and signature, when required)
CHESTER W. WELSOE, LT COL, USAF

RELEASING OFFICER'S SIGNATURE

SYMBOL: AFCJA-22 | TELEPHONE: 57753

OFFICIAL TITLE: Brig Gen USAF
The A. st JAG, USAF

DD FORM 1 OCT 49 173 REPLACES NME FORM 173, 1 MAY 48. WHICH MAY BE USED. GOVERNMENT PRINTING OFFICE

[fol. 98] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 150

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, Petitioner,

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUN 18 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 1503

UNITED STATES OF AMERICA EX. REL. AUDREY M. TOTH,
Petitioner

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1953

No.

UNITED STATES OF AMERICA EX. REL. AUDREY M. TOTH,
Petitioner

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Audrey M. Toth,[1] petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of the United States District Court for the District of Columbia. (R. 54) Judgment was entered in the District Court on September 3,

---

[1] This action was instituted on behalf of Robert W. Toth by Audrey M. Toth, his sister.

1953 on the return of a writ of habeas corpus ordering the release and discharge of civilian Robert W. Toth, brother of petitioner herein, from custody of the respondent herein, the Secretary of the United States Air Force. (R. 35) In reversing the district court the Court of Appeals ordered the case remanded with instructions to discharge the writ and return Toth to the custody of military authorities. (R. 53)

OPINIONS BELOW

The opinions of the district court are reported *sub nom.*, *Toth* v. *Talbott* at 113 F. Supp. 330 (D.C.D.C. 1953) and at 114 F. Supp. 468 (D.C.D.C. 1953) and are contained in the record at pages 21-23 and 30-33. The opinion of the Court of Appeals is contained in the record at pages 37-53 and is not yet reported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on March 25, 1954. (R. 54)

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254, 62 Stat. 928.

QUESTIONS PRESENTED

The questions presented to the Court for consideration and determination are:

1. Whether the Congress may, without violating the Constitution of the United States, provide by legislation that a citizen of the United States who has been honorably discharged from the military service of the United States and who is engaged in a civilian occupation, not in any way connected with the armed forces, may be apprehended in Pennsylvania, arrested, confined, transported without a civil hearing of any kind to Korea and there detained for purposes of court martial on the order of the Secretary of

the Air Force charging him with the commission of a crime during his prior military service,

2. What authority, if any, does the Congress have to enact legislation providing for the court martial of a civilian?

3. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice exceed the powers granted it under Article 1, Section 8, Clauses 12 and 14 of the Constitution?

4. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice attempt to provide a system of criminal procedure for civilians different from that required and guaranteed by the Fifth and Sixth Amendments to the Constitution?

5. Did not the Congress in enacting Article 3(a) of the Uniform Code of Military Justice, fail to provide for the apprehension, arrest and detention of civilians whom it attempted to make amenable to military justice?

6. When does a *case* "arise in the land or naval forces" within the meaning of the Fifth Amendment to the Constitution?

STATUTES INVOLVED

Involved in this cause are the following provisions of the United States Constitution:

Article 1, Section 8. The Congress shall have power . . .

> Clause 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . .
>
> Clause 14. To make rules for the government and regulation of the land and naval forces.

Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases

arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any crminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The Uniform Code of Military Justice, 64 Stat. 107-145; 50 U.S.C.A. § 551 *et seq.*, provides in pertinent part:

> Article 3(a): Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status. (64 Stat. 109, 50 U.S.C.A. § 553(a)).
>
> Article 9:
>
> (a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
>
> . . .
>
> (c) An officer, a warrant officer or a civilian, subject to this code or to trial thereunder, may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. (64 Stat. 111, 50 U.S.C.A. § 563(a), 563(c)).

STATEMENT OF THE CASE

Robert W. Toth, on whose behalf the petition for writ of *habeas corpus* was filed in the district court below, was honorably discharged from the United States Air Force

on December 8, 1952. (R. 1-2) Prior to his discharge he had served in Korea.

On April 8, 1953 an officer of the United States Air Force, Far East Air Logistic Command, signed court-martial charges under oath charging the accused with the murder in Korea of a Korean national and with conspiracy to commit murder against the same Korean national. It was charged that the alleged offenses were committed on or about September 27, 1952. (R. 15-17) Thereafter on April 30, 1953 the then Acting Secretary of the Air Force consented to and directed the apprehension of Mr. Toth by the Air Provost Marshal and directed the Air Provost Marshal to "cause him (Toth) to be delivered forthwith to the Commanding General, Fifth Air Force, to answer the said court-martial charges". (R. 20)

Thereafter, on May 13, 1953, Robert W. Toth was secretly arrested at his place of employment in Pittsburgh, Pennsylvania, by military authorities and, without being afforded a hearing of any type, was flown to Korea to face possible trial on the court-martial charges. (R. 2)

Subsequent to his arrival in Korea on May 27, 1953, a Petition for Writ of Habeas Corpus was filed on behalf of said Robert W. Toth by his sister, Audrey M. Toth. (R. 1) Harold E. Talbott was named as respondent in said petition in his capacity as Secretary of the United States Air Force, in that said respondent was illegally restraining, detaining and depriving said Robert W. Toth of his liberty. (R. 1) In said petition it was averred, *inter alia*, that the seizure and arrest of Toth constituted a denial of his rights of procedural due process, as guaranteed him as a citizen of the United States under the Fourth and Fifth Amendments of the Constitution; that he was likewise deprived of the rights guaranteed him by Rules 5 and 40 of the Federal Rules of Criminal Procedure; that Section 3(a) of the Uniform Code of Military Justice, insofar as it applied to Toth, was unconstitutional and void as being contrary to the Fourth and Fifth Amendments and as being vague and indefinite; and that

said Robert W. Toth as a civilian was not amenable within the framework of the Constitution to military seizure, arrest and trial by court-martial. (R. 1-6)

On the same day (May 27, 1953) a rule directing the respondent to show cause was issued. (R. 7) Thereafter, on June 25, 1953, after hearing, Judge Holtzoff of the United States District Court for the District of Columbia ordered that the writ of *habeas corpus* issue. (R. 24) In its opinion the district court stated:

> ". . . The fact is that there is an omission in the Code of Military Justice on this matter. No machinery is provided whereby a civilian can be arrested and removed to a distant point for trial by court-martial. It would be wrong for the Court to try to supply the machinery which Congress has omitted to furnish.
>
> This subject is a very serious one, as the Court sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. *It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done.*" (R. 23) (Emphasis supplied).

Upon motion of respondent Talbott the effectiveness of this order for issuance of the writ of habeas corpus was stayed pending appeal. (R. 25-26) This appeal was subsequently dismissed by the United States Court of Appeals on the ground that the order appealed from was not final or otherwise appealable. (R. 27-28)

After additional proceedings in the district court, which are not germane to the issues presented here, the cause came on for hearing upon return of the writ on September 3, 1953. After full hearing the district court sustained the writ and ordered the discharge of the prisoner Robert W. Toth from custody. (R. 33) In its opinion the district court deemed it premature to pass upon the constitu-

tionality of Section 3(a) of the Uniform Code of Military Justice, but held that there was no statutory provision in the Uniform Code providing for the arrest and transportation of a civilian by the military. (*Toth* v. *Talbott*, 114 F Supp. 468, R. 30-33).

From this order discharging Toth from custody the Secretary of the Air Force appealed. (R. 35) The order of release was stayed pending appeal and Toth was released from custody under bond. (R. 34)

On March 25, 1954, the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered reversing the judgment of the District Court. (R. 54) By its judgment the Court of Appeals ordered the cause remanded to the district court "with instructions to discharge the writ and to return Toth to the custody of the military authorities". (R. 53) The opinion of the Court of Appeals is set forth in the record at pages 37 through 53.

REASONS FOR THE ALLOWANCE OF THE WRIT

The questions to be presented to this Court for consideration and determination are at once novel, as being matters of first impression, and broad and far-reaching in their scope and ramifications.

Under one aspect, the Court is being called upon to consider and interpret the new Uniform Code of Military Justice, 64 Stat. 107-145, 50 U.S.C.A. §551 *et seq.* The statute herein concerned is extremely broad in scope; and is legislation which, in that part which is brought to the attention of the Court, directly affects the lives of many citizens of this country.

The questions sought to be presented are important to the proper administration of justice in this country. They present matters of substance directly relating to the construction and application of a statute of the United States and directly relating to the construction and interpretation of the Constitution of the United States. These

are matters which have not heretofore been but which should be settled and determined by this Court.

The questions are important to the determination of the proper separation of civil and military justice under our Constitution. Directly involved is the question of whether and to what extent, within the framework of the Constitution, the Congress can convert our democratic civil government into a military oligarchy. This is not a matter of academic interest only, but a matter of real and pressing importance which directly involves the lives and rights of some 16,000,000 citizens of this country. Under the Uniform Code of Military Justice and the opinion of the Court of Appeals in interpreting the applicable provisions of this Code, this many people, comprised of persons previously subject to military service, are deprived of all civil protection and are subject *nolens volens* to the rigors of military law and discipline.

It has been held by this Court almost from the beginning of our government that the military authorities are without jurisdiction to court-martial a civilian. *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806). This complete and total lack of jurisdiction of the military over civilians has been reiterated by this Court in *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 173 (1892) and again, as recently as 1938, in the case of *Stoll* v. *Gottlieb*, 305 U.S. 165, 176. The holding of the Court of Appeals below and its action in ordering the return of Toth to the military authorities are in direct conflict with the prior statements of this Court as set forth in those cases.

In the field of federal criminal law an accused civilian has certain guaranteed basic rights, such as, for example, the right to be free from an unreasonable seizure, the right to indictment by a grand jury, the right to trial by jury, the right to bail, the right to subpoena witnesses, the right to a *prompt* preliminary hearing, the right to counsel of his own choosing. In military law the rights granted the accused are not fundamental constitutional rights but are the rights afforded by statute. In the case

of *Burns* v. *Wilson*, 346 U.S. 139 (1953), this Court reiterated that due process of law in the military differed in material respects from due process in the civil sphere. Likewise this Court held, in *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866), that the guarantees of the 5th and 6th Amendments are preserved to everyone accused of a crime who is not actually in military service.

The Court of Appeals below held with respect to Article 3(a) that: "In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed". (R. 41) But this completely begs the question. In *United States* v. *Grimley*, 137 U.S. 147 (1890) the Court held that one who had the status of a soldier was subject to court-martial; one not in such status is not subject to military discipline. The thrust of petitioner's case is not approval or disapproval of the end Congress sought to accomplish, it is rather the means to accomplish that end which are under attack. Congress cannot by legislative fiat turn a civilian into a soldier for the purpose of punishment.

Colonel William Winthrop, one of the recognized authorities on military law in this country whose treatise had been ordered printed at government expense for the information of army personnel, many years ago stated the question as follows:

> "But does the power to 'raise armies' extend to the inclusion of such civilians in the land forces? What are 'armies' in the sense in which this term is used in the Constitution? Its interpretation is to be found in the series of statutes dating from the period of the adoption of that instrument, and of which the constitutionality has not been questioned, by which the constituents of our armies or Army have been repeatedly defined. These constituents are a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay, and

> remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state. Such are the 'armies' or 'land forces' which the Constitution authorizes Congress to raise, support and govern. Can this authority be held to include the raising or constituting, and the governing *nolens volens*, in time of peace, as a part of the army, of a class of persons who are under no contract for military service, but on the contrary have been formally discharged from all such contract, who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity except the special one for which the statutes under consideration propose to reserve them? Can the authority to govern be extended to the disciplining of soldiers after they have been legally separated from the Army? In the opinion of the author, such a range of control is certainly beyond the power of Congress under the provisions of the Constitution referred to. That instrument, in a further provision also,—the Vth Amendment,—clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations —and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law." Winthrop, *Military Law and Precedents*, Gov't Printing Office (2d Ed. 1920), pp. 105-106.

Throughout the proceedings below petitioner had taken the position that Congress in enacting the Uniform Code of Military Justice failed to provide for the apprehension or arrest and detention of civilians whom it attempted to make amenable to military law. Section 3(a) of the Uniform Code provides in substance that discharge from military service does not relieve a person from amenability to trial by courts-martial for a crime committed while in service. However, it was the holding of the district court

in granting the writ of habeas corpus and discharging the petitioner from custody that there is an omission in the Uniform Code in that no provision is made for the arrest and detention of civilians. The correctness of the district court's holding in this regard is made evident by examination of Article 9 of the Code which deals with the "arrest", "apprehension" and "confinement" of persons subject to the Code.

Article 9(a) of the Uniform Code provides in part that: "Confinement is the physical restraint of a person." Article 9(c) provides in pertinent part that ". . . a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated." Plainly, Toth as a civilian had no commanding officer "to whose authority he is subject", and plainly there was no one who could legally order his confinement or physical restraint. The record shows that court-martial charges were filed against Toth over the signature of a Colonel Hurst (R. 34) and that no further action was taken by any alleged "commanding officer"; but on the contrary, the Acting Secretary of the Air Force, not a commanding officer, but a civilian, consented to the court-martial charges and ordered the Air Provost Marshal to effect Toth's apprehension. (R. 20)

In its opinion the Court of Appeals held:

> "It is suggested that Articles 3(a) and 9(c) of the Uniform Code are inconsistent with each other. The latter Article provides that a civilian subject to the Code 'may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject'. But 'arrest or confinement' in military parlance is restraint by order, as contrasted with a taking into custody, which is termed 'apprehension'. A strict distinction between the two is made in military rules. We see no inconsistency between the Articles." (R. 52)

With due respect to the Court of Appeals petitioner's contention is not "inconsistency" but a statutory omission. If the opinion and judgment of the Court of Appeals is allowed to stand we will in effect have a judicial determination that Congress can deprive civilians of constitutional guarantees by implication. In substance and effect so also we will have a judicial determination that the military is superior to the civil, in that by implication at least some 16,000,000 civilian citizens of this country have a commanding officer who can order, without hearing, their arrest and physical restraint.

In *Muskrat* v. *United States*, 219 U.S. 346 (1910) this Court had occasion to analyze, as contained in Article 3 of the Constitution, the meaning of the word "case". In its opinion this Court adhered to Mr. Chief Justice Marshall's definition in *Marbury* v. *Madison* (1 Cranch 137), that a "case" was a suit instituted according to the regular course of judicial procedure. This petitioner takes the position that "case" in the 5th Amendment has the same meaning as it does under Article 3. The Court of Appeals below however held that ". . . although a crime does not become a case, i.e. a legal proceeding, until a charge is made, a case *arises* when the crime is committed; just as a man is born on the day of his birth, although he is not a man until many years thereafter." (R. 41) It would appear that the Court of Appeals not only completely ignored prior rulings of this Court defining the very term in issue but ascribes to the term a meaning which would tend to make the constitutional guarantee a nullity. *Case* within the meaning of the 5th Amendment must be a legal proceeding; where else can a person "be held to answer" for a crime? If the amendment contained the word "cause" rather than "case", the lower court's language would be appropriate. Every "cause" does not become a "case", i.e. a legal proceeding. Every child does not become a man. But this Court is not being requested to correct the limping analogy of the appellate court; it

is being requested to reverse a holding that is plainly contrary to prior rulings of this Court and plainly contrary to the clear and unequivocal meaning of the language of the Constitution.

Should the opinion of the Court of Appeals be allowed to stand, the rights and liberties of millions of men and women who have served honorably in the armed forces are placed in jeopardy. In substance and effect the lower court has given the military *carte blanche* authority permitting the arrest and confinement of any discharged service man or woman. The Court of Appeals has advised the military in effect that, on a mere sworn statement alleging the commission of a crime, without a judicial inquiry of any type to determine probable cause, armed soldiers may seek and effect the arrest of a civilian no matter where he may be or what his station or circumstance may be and, having arrested him, secretly transport him anywhere in the world. The issue sought to be presented to this Court for determination is not the guilt or innocence of one man. The issue is whether Congress can validly legislate military despotism. If the Writs of Assistance, used so unconscionably by the British in Colonial days, were so abhorrent to our founding fathers as to give rise to Constitutional safeguards, wherein lies the power under the Constitution to give sanction to the oppressive and high-handed conduct set forth in the record herein?

This case presents a flagrant abuse of the indefeasible right of a citizen of this country to his personal security, as guaranteed to him by the Fourth Amendment.

This case presents an egregious example of the deprivation of a civilian's right to be held to answer for a capital or otherwise infamous crime only upon indictment of a grand jury and of his right not to be deprived of his liberty without due process of law as guaranteed to him by the Fifth Amendment.

This is an important case. It is not academic; the matters brought to the attention of the Court are real and pressing. Eternal vigilance, they say, is the price we must pay for our liberty. The facts of this case clearly show that liberty as we have heretofore known it may, if we are not vigilant, soon become a thing of the past. This Court is being requested to determine whether the Constitution is yet the shield of our liberty; still the bulwark of due process of law; still the bastion for protection of the rights of our citizens from the overweening despotism of the military.

CONCLUSION

WHEREFORE, the petitioner prays the granting of the writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 158

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH,
Petitioner,

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE, *Respondent.*

BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1954

No. 150

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH,
Petitioner,

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE, *Respondent.*

BRIEF OF PETITIONER

OPINIONS BELOW

The opinions of the district court are reported *sub nom.*, *Toth* v. *Talbott* at 113 F. Supp. 330 (D.C.D.C. 1953) and at 114 F. Supp. 468 (D.C.D.C. 1953) and are contained in the record at pages 21-23 and 30-33. The opinion of the Court of Appeals is reported at 215 F. (2d) 22, U.S. App. D.C. , and is contained in the record at pages 37-50.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on March 25, 1954. (R. 51) The petition for writ of certiorari was filed herein on June 18, 1954.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254, 62 Stat. 928.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved in this cause are the following provisions of the United States Constitution:

Article 1, Section 8. The Congress shall have power . . .

Clause 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . .

Clause 14. To make rules for the government and regulation of the land and naval forces.

Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment 6: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Uniform Code of Military Justice, 64 Stat. 107-145; 50 U.S.C.A. § 551 *et seq.*, provides in pertinent part:

> Article 3(a): Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status. (64 Stat. 109, 50 U.S.C.A. § 553(a)).
>
> Article 7:
>
> (a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. (64 Stat. 111, 50 U.S.C.A. § 561).
>
> Article 9:
>
> (a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
>
> (c) An officer, a warrant officer or a civilian, subject to this code or to trial thereunder, may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. (64 Stat. 111, 50 U.S.C.A. § 563(a), 563(c)).

QUESTIONS PRESENTED

1. Whether the Congress may, without violating the Constitution of the United States, provide by legislation that a citizen of the United States who has been honorably discharged from the military service of the United States and who is engaged in a civilian occupation, not in any way connected with the armed forces, may be apprehended in Pennsylvania, arrested, confined, transported without a civil hearing of any kind to Korea and be there detained for purposes of court-martial on the order of the Secretary of the Air Force charging such civilian with a crime allegedly committed during his prior military service.

2. Does not the Congress lack the power and authority to enact legislation providing for the court-martial of a civilian who has been honorably discharged from military service prior to the institution of court-martial proceedings against him?

3. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice exceed the powers granted it under Article 1, Section 8, Clauses 12 and 14 of the Constitution?

4. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice attempt to provide a system of criminal procedure for civilians different from that required and guaranteed to civilians by the Fifth and Sixth Amendments to the Constitution?

5. Does a *case* "arise in the land or naval forces" within the meaning of the Fifth Amendment to the Constitution when an offense is committed or does it arise only when a legal proceeding is commenced?

6. Did not the Congress in enacting the Uniform Code of Military Justice fail to provide the necessary procedural machinery for the apprehension, arrest, detention and confinement of civilians whom it attempted to make amenable to military trial?

STATEMENT OF THE CASE

Robert W. Toth[1], on whose behalf the petition for writ of *habeas corpus* was filed in the district court below, was honorably discharged from the United States Air Force on December 8, 1952. (R. 1-2) Prior to his discharge he had served in Korea.

On April 8, 1953, an officer of the United States Air Force, Far East Air Logistic Command, signed court-martial charges under oath charging said Robert W. Toth a "civilian, formerly Airman First Class" with the murder in Korea of a Korean national and with conspiracy to commmit murder against the same Korean national. It was charged that the alleged offenses were committed on or about September 27, 1952. (R. 15-17) Thereafter, on April 30, 1953 the then Acting Secretary of the Air Force consented to and directed the apprehension of Mr. Toth by the Air Provost Marshall and directed the Air Provost Marshall to "cause him (Toth) to be delivered forthwith to the Commanding General, Fifth Air Force, to answer the said court-martial charges". (R. 20)

Thereafter, on May 13, 1953, Robert W. Toth was arrested at his place of employment in Pittsburgh, Pennsylvania, by military authorities and, without being afforded a hearing of any type, was flown to Korea to face possible trial on the court-martial charges. (R. 2) Despite the fact that the military authorities were familiar with where he lived (R. 20), no effort was made to arrest or apprehend him at his home.[2]

Subsequent to his arrival in Korea on May 27, 1953, a Petition for Writ of Habeas Corpus was filed on behalf of said Robert W. Toth by his sister, Audrey M. Toth.

---

[1] The action was instituted on behalf of Robert W. Toth on the relationship of Audrey M. Toth, his sister.

[2] The complete record before the district court, which is on file in this Court, contains affidavits which show the extensive nature of the plans of the military to effectuate the arrest at Mr. Toth's place of employment. (Tr. 219-223)

(R. 1) Harold E. Talbott was named as respondent in said petition in his capacity as Secretary of the United States Air Force in that said respondent was illegally restraining, detaining and depriving said Robert W. Toth of his liberty. (R. 1) In said petition it was averred, *inter alia*, that the seizure and arrest of Toth constituted a denial of his rights of procedural due process, guaranteed him as a citizen of the United States under the Fourth and Fifth Amendments of the Constitution; that he was likewise deprived of the right guaranteed him by Rules 5 and 40 of the Federal Rules of Criminal Procedure; that Section 3(a) of the Uniform Code of Military Justice, insofar as it applied to Toth, was unconstitutional and void as being contrary to the Fourth and Fifth Amendments and as being vague and indefinite; and that Robert W. Toth as a citizen was not amenable within the framework of the Constitution to military seizure, arrest and trial by court-martial. (R. 1-6)

On the same day (May 27, 1953) a rule directing respondent to show cause was issued. (R. 7) Thereafter on June 25, 1953, after hearing, Judge Holtzoff of the district court ordered that writ of *habeas corpus* issue. (R. 24) In its opinion the district court stated:

> "This subject is a very serious one, as the Court sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done." (R. 23)

Upon motion of respondent Talbott the effectiveness of this order for issuance of the writ of habeas corpus was stayed pending appeal. (R. 25-26) This appeal was subsequently dismissed by the United States Court of Appeals for the District of Columbia Circuit on the grounds that

the order appealed from was not final or otherwise appealable. (R. 27-28)

After additional proceedings in the district court, which are not germane to the issues presented here, the cause came on for hearing upon return of the writ on September 3, 1953. After full hearing the district court sustained the writ and ordered the discharge of the prisoner Robert W. Toth from custody. (R. 33)[3] In its opinion the district court deemed it premature to pass upon the constitutionality of Section 3(a) of the Uniform Code of Military Justice, but held that there was no statutory provision in the Uniform Code providing for the arrest and transportation of a civilian by the military. (*Toth* v. *Talbott*, 114 F. Supp. 468; R. 30-33).

From this order discharging Toth from custody the Secretary of the Air Force appealed. (R. 35) The order of release was stayed by the district court pending appeal and Toth was released from custody under bond of $1,000.00 (R. 34).[4]

On March 25, 1954 the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered reversing the judgment of the district court. (R. 51) By its judgment the Court of Appeals ordered the cause remanded to the district court "with instructions to discharge the writ and to return Toth to the custody of the military authorities". (R. 50) The opinion of the Court of Appeals (R. 37-50) is reported at 215 F. 2d 22.

---

[3] The full text of this order was inadvertently omitted from the printed record filed herein. It is, however, set forth in the original record filed herein (Tr. 224) and for convenience has been set forth as an appendix to this brief at page 47.

[4] It is to be noted that at the time the appeal bond was set by the trial court, counsel for the respondent outlined in strongest terms the Air Force's case against Toth. This case was characterized by the trial court as constituting an assault (a misdemeanor) rather than murder as charged. (Tr. 72)

SUMMARY OF ARGUMENT

At the time court-martial proceedings were instituted against him, Robert W. Toth was a civilian. All connection which he previously had with the United States Air Force had been severed by his honorable discharge from service. He was and is not in military status and no court-martial can have jurisdiction over him. *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331; *In re Grimley*, 137 U.S. 147.

The *sine qua non* to court-martial jurisdiction is that the accused must have the status of a soldier or sailor, *Ex parte Milligan*, 4 Wall. 2. Congress cannot by legislative fiat make the civilian a soldier for the sole purpose of military punishment. Winthrop. *Military Law and Precedents*, (2d Ed. 1906) 106.

Under the powers granted to Congress in Article 1, Section 8 of the Constitution, Congress has no authority to enact legislation providing for the court-martial of a civilian. Congress has the power and authority "to make rules for the government of the land and naval forces" and the plain meaning of that language is that whatever court-martial procedures or proceedings which are enacted by Congress can be made applicable only to those who are actually in military service. The armies which Congress is empowered to raise and govern are comprised of bodies or numbers of men who are "bound to obey military orders and to perform military duty . . ., entitled to military pay and remaining under military discipline and government till discharged in due form or otherwise legally separated from the military state." Winthrop, *Military Law and Precedents, supra*, p. 106.

By specific legislation Congress has made provision for the *number* of men who comprise the United States Air Force (64 Stat. 323, 10 U.S.C. § 20s, suspended by Act of Aug. 3, 1950, c. 537, 64 Stat. 408, as amended by 65 Stat. 88) and has likewise defined the constituent elements of the Air Force. (10 U.S.C. § 1831). Insofar as the Air

Force is concerned, Congress has power under Article 1, Section 8 of the Constitution to provide for the government and regulation only of this group of men. Any effort on the part of Congress to make military rules for the punishment of one who is not a member of or a part of those forces is an usurpation of the authority granted to Congress. There is a complete failure of jurisdiction in the Air Force to court-martial a civilian who is not connected in any way with the forces or groups of men who comprise that branch of the service.

The personal guarantees of liberty embodied in the Fifth and Sixth Amendments form a complete bar to any effort on the part of Congress to provide for the trial of a civilian under military law. Congress cannot enact any valid legislation which would deprive a civilian citizen of the basic rights guaranteed by the Fifth and Sixth Amendments.

The phrase "except in cases arising in the land or naval forces" contained in the Fifth Amendment does not obviate the necessity of indictment by grand jury as guaranteed by that Amendment unless the accusation, charge or court-martial proceeding was commenced while the accused was actually in military service. This is clear from the history of that excepting clause, from the meaning which has been given to the word *case* as used elsewhere in the Constitution, and from the cases in which the phrase has been interpreted and applied.

The Fifth Amendment is the result of the fears of the citizens of the thirteen original states that federal despotism or military dictatorship would stifle the personal liberties for which they had fought the Revolutionary War. Examination of the propositions which were submitted by the State Constitutional Conventions of Massachusetts, New Hampshire, New York and North Carolina, among others, and which ultimately resulted in the Fifth Amendment, make it clear that the citizens of those states desired it to be a part of the supreme law of the land that their civilian citizens would be forever protected against

military accusations, trial and punishment. This Court has had occasion to consider the meaning of the word "cases" as used in Article 3, Section 2 of the Constitution, and has held that a case arises within the meaning of that section when the subject is submitted to the court by a party who asserts his rights in the form prescribed by law. *Osborn* v. *Bank of the United States*, 9 Wheat (22 U.S.) 738, 819. In the case of *Re Pacific R. Commission*, 32 Fed. 241, 255, Mr. Justice Fields stated:

> "Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case."

In a criminal proceeding, a case never arises until the accusation or charge has been made. *Counselman* v. *Hitchcock*, 142 U.S. 547; *United States* v. *Patterson*, 150 U.S. 65, 68.

To hold otherwise than that a "*case arises*", within the meaning of the excepting clause of the Fifth Amendment, when the criminal charge, accusation or proceeding is instituted or commenced would be to hold the guarantees of personal liberty contained in that Amendment nugatory and valueless, and would do violence to the meaning which has previously been given to an identical phrase in other cases decided by this Court.

Lower federal courts, following the case of *In re Bogart*, 3 Fed. Cas. 796 (C.C.D. Calif. 1873), have held that the word "*cases*" as used in the excepting clause of the Fifth Amendment is synonymous with the word "*events*". Other courts have followed the reasoning that a case does not arise until a charge is filed or a legal proceeding is instituted. *Ex parte Wilson*, 33 F. (2d) 214 (D.C.E.D. Va. 1929); *U. S. ex rel. Flannery* v. *Commanding General*, 69 F. Supp. 661 (D.C.S.D.N.Y. 1946).

The holding of the court of appeals below that "although a crime does not become a case, i.e., a legal proceeding, until a charge is made, a case *arises* when the crime is

committed'' strips the protections of the Fifth Amendment of their strength and vigor. Likewise the analogy which that court used to support the proposition is inapposite.

The cases which have upheld the constitutionality of the Act of March 2, 1863 (12 Stat. 696) and more particularly the case of *In re Bogart*, 3 Fed. Cas. 796, which is cited as the leading case on the subject, are not sound authority, for the basic premise on which such cases depend is that the word *cases* as used in the excepting clause means nothing more than *events*. Examination of the *Bogart* decision shows that the court took a dictionary definition for the meaning of *cases* and held such definition to be its meaning in the legal and constitutional sense. The decision in the *Bogart* case is irreconcilable with the decision of this Court in *Ex parte Milligan*, 7 U.S. 2, 123. More efficacious as authority than *Bogart* is *Ex parte Henderson*, 11 Fed. Cas. 1067, wherein it was determined that any attempt on the part of Congress to provide for the court-martial of any person not actually in the land or naval forces was unconstitutional.

The personal liberties guaranteed by the Fifth and Sixth Amendments are indefeasible liberties and this Court has held that no legislation could validly be enacted which would deprive the civilian citizen of such rights. *Ex parte Milligan, supra.* In this case, however, the United States Air Force acting under title and authority of Article 3(a) of the Uniform Code of Military Justice has deprived or sought to deprive Robert W. Toth of his right to be free from unreasonable seizure, of his right to bail, of his right to indictment by a grand jury, of his right to trial by jury, of his right to subpoena witnesses, of his right to a prompt preliminary hearing, and of his right to counsel of his own choosing.

In the case of *Wong Wing* v. *United States*, 163 U.S. 228, this Court had occasion to strike down as unconstitutional a statute which provided for the summary punishment of aliens. This Court held that the guarantees of

the Fifth and Sixth Amendments applied to all persons within the United States and "that even aliens shall not be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .".

If it be assumed that Congress could, within the framework of the Constitution, enact valid legislation making civilians amenable to military trial and punishment, there is a fatal jurisdictional defect in the Uniform Code of Military Justice in that no provision is made therein for the apprehension, arrest, detention or confinement of civilians. The Uniform Code of Military Justice provides a *casus omissus* in that the military authorities are nowhere given the authority to arrest or apprehend the civilian, or to confine or physically restrain him of his freedom.

Article 3(a) merely details that the discharged service men is not relieved from amenability to trial by courts-martial notwithstanding the fact that the military status is terminated. But this detailing of "amenability" to military trial does not confer jurisdiction to try.

Article 9(a) of the Code provides that "confinement is the physical restraint of a person". Article 9(c) provides that "a civilian subject to this code . . . may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject . . .". The term "commanding officer" has a specific meaning by virtue of the regulations issued pursuant to authority granted by the code and includes within its terms only military persons. *The Manual For Courts-Martial, United States, 1951*, § 21 (a). Toth had no commanding officer at the time charges were placed against him. He was a civilian in the full sense of the word and there was no one who could order his court-martial.

The authority granted under Article 7(b) of the Uniform Code which permits military police to take into custody persons subject to the Code is nothing more than

an authorization to the military to effectuate the same type of arrests that civilian peace officers can lawfully accomplish when acting without a warrant. It is made clear from the Regulations issued pursuant to the Code that the authority to apprehend granted in Article 7 does not carry with it the authority to *confine*. *Manual for Courts-Martial, United States, 1951*, § 19(d).

If it is assumed that the Air Force had power to apprehend Toth by virtue of Article 7(b), once his apprehension was effected the power of the Air Force was exhausted. Under the Regulations there was no commanding officer who could order Toth's confinement, there was no commanding officer to whose authority he could be delivered.

Equally important, however, is that under the plain language of the Code an honorably discharged civilian was not a "person subject to the code" who could be apprehended by military authorities under Article 7(b). Article 2 of the Code enumerates twelve categories of persons who are subject to the Code. A person having the same status as Toth does not fall within any of these categories and Toth is clearly not a person who can be apprehended by military police.

The issue which is presented for determination by this Court is not the guilt or innocence of one civilian. The issue is whether Congress, under the Constitution, can deprive the civilian citizen of this Country of those sacred, inalienable rights guaranteed in the Fifth and Sixth Amendments. This Court has held it to be "the birthright of every American citizen when charged with crime, to be tried and punished according to law." *Ex parte Milligan*, 71 U.S. 2, 118.

Careful examination of the Uniform Code of Military Justice shows that the intent of Congress in enacting Article 3(a) has already been defeated. It is clear that Congress intended to cover only serious crimes involving maximum punishments of five or more years confinement.

But in reality even the most petty offenses are now within the ambit of the amenability provision of Article 3(a). Under Article 56 the President is empowered to prescribe maximum punishments for offenses listed under the code and by Executive Order 10247, dated May 29, 1951, punishment for certain offenses was suspended with the result that a discharged serviceman would be subject to court-marital for such petty military offenses as being Absent Without Leave for one day or Missing Movement.

ARGUMENT

I. CONGRESS HAS NO POWER UNDER THE CONSTITUTION TO ENACT LEGISLATION PROVIDING FOR THE COURT-MARTIAL OF A CIVILIAN.

A. Congress Cannot by Legislative Fiat Make One, Who Has No Connection With the Military Forces, a Soldier for the Sole Purpose of Military Trial and Punishment

Petitioner's case is bottomed on the fact that Robert W. Toth at all times pertinent to the inquiry herein was a civilian. He was honorably discharged from the United States Air Force on December 8, 1952 (R. 1-7, 15) and on that date resumed his status as a civilian citizen of the United States.

From December 8, 1952 his connection with the Air Force or with military authority was entirely and completely severed. He was not a member of the reserves; he had no commanding officer; he received no military pay or allowances; he was not subject to military control or discipline of any type; he had no military obligations or duties and could be the recipient of no benefits from the military; indeed his wearing of an Air Force uniform would have subjected him to criminal prosecution and punishment, 18 U.S.C. § 702; *Gaston* v. *United States*, 79 U.S. App. D.C. 37, 143 F. 2d 10, cert. denied 322 U.S. 764.

He was a civilian living at his home in Pittsburgh, Pennsylvania, engaged in earning his livelihood in a strictly civilian occupation when court-martial charges were filed against him on April 8, 1953. (R. 15) And he was

a civilian all the while he was held in custody by the military authorities from May 13, 1953 until his release from custody was ordered by the district court below on September 3, 1953. (R. 30)

It is petitioner's contention that perforce this civilian status of Toth there is a complete failure of jurisdiction in the Air Force to arrest or apprehend him, to hold him in custody, or to seek to try him by court-martial. In the case of *In re Grimley* (*United States* v. *Grimley*), 137 U.S. 147 this Court held that one who had the status of a soldier was subject to court-martial; one not in such status is not subject to military discipline; and that it is a proper function for the civil courts to ascertain by means of the writ of *habeas corpus* whether or not the court-martial has jurisdiction. Likewise in that case and in the case of *Morrissey* v. *Perry*, 137 U.S. 157, this Court explicitly held that military service effected a change in status and, in the *Grimley* case, compared it to the change of status which is effected by marriage.

Prior to the enactment of Article 3(a) of the Uniform Code of Military Justice on May 5, 1950, this Court had repeatedly held that only persons in the military status were amenable to trial by court-martial, or, to put it differently, that a court-martial had jurisdiction only over persons in military status. As early as 1806 in the case of *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, Chief Justice Marshall, speaking for the court, held that a court-martial had absolutely no jurisdiction over a person not in the militia and that the court-martial and officers who attempted to exercise such jurisdiction were trespassers. In *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 173, it was held that where "a court-martial proceeds and sentences a person *not in the military or naval service*" (emphasis added) the act is not merely voidable but void and the whole proceeding a nullity for failure of jurisdiction over the subject matter. This principle was reiterated in *Stoll* v. *Gottlieb*, 305 U.S. 165, 176.

It would appear that in all cases involving courts-martial decided by this Court, with the exception of *Wise* v. *Withers, supra; Ex parte Milligan,* 4 Wall. 2, and *Hirshberg* v. *Cooke,* 336 U.S. 210, the accused's actual status as a soldier, the *sine qua non* to court-martial jurisdiction, was not in issue. The case of *Ex parte Wilson,* 33 F. (2d) 214 is illustrative of this jurisdictional proposition, for in that case it was held that the act of the President in dropping a naval ensign from the rolls of the Navy for leaving his post without leave made such person a civilian, and that because of his civilian status a naval court-martial had no jurisdiction over him.

By Article 3(a) of the Uniform Code of Military Justice Congress enacted that ". . . . .any person charged with having committed, while in a status in which he was subject to this code, an offense against this code . . . shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status". (64 Stat. 109, 50 U.S.C. § 553(a)). In speaking of this article the court of appeals below held: "In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed." (R. 40) In this holding the court of appeals completely missed the point at issue. It made no distinction between "absolution" and "amenability to trial". There is a recognized difference between jurisdiction over the offense and jurisdiction over the person. Congress cannot give a court-martial jurisdiction over the person of a civilian. Congress cannot by legislative fiat turn a civilian into a soldier for the sole purpose of summarily punishing him.

It is a truism that one who has the status of a soldier has certain rights, duties and obligations different from those of a civilian, *Reaves* v. *Ainsworth,* 219 U.S. 296; *Ex parte Mason,* 105 U.S. 696; *Burns* v. *Wilson,* 346 U.S. 137. Congress cannot legislate a hybrid status (Winthrop,

Military Law and Precedents, (2d ed. 1920) 106); Congress cannot deprive the civilian *nolens volens* of his rights as a civilian and subject him to the rigors of military law and discipline. For example, this Court has said: "To those in the military or naval service of the United States, the military law is due process." *Reaves* v. *Ainsworth, supra*, at 304. In the field of federal criminal law the accused civilian has certain guaranteed basic rights, such as, for example, the right to be free from unreasonable seizure, the right to indictment by a grand jury, the right to trial by jury, the right to bail, the right to subpoena witnesses, the right to a *prompt* preliminary hearing, the right to counsel of his own choosing. *Vide: Rule 5 and Rule 40, Federal Rules of Criminal Procedure.* These rights are not guaranteed the military person who is subject to military regulation and discipline.

B. Congress Lacks the Power to Enact Valid Legislation Providing for the Court-Martial and Trial of Civilians Who Are Not Connected in Any Way With the Military Forces

Whatever positive authority the Congress has to enact legislation providing for courts-martial is contained in Article 1, Section 8 of the Constitution. Two separate clauses in that Section set forth the scope of Congressional power and authority. The pertinent provisions are:

> "Section 8. The Congress shall have power . . .
>
> 12. To raise and support armies, but no appropriation of money to that use shall be for a longer period than two years; . . .
>
> 14. To make rules for the government and regulation of the land and naval forces."

It is the position of the petitioner that these constitutional provisions and grants in no wise empower the Congress to enact legislation which could validly encompass the court-martial of a civilian. The validity of this position should be apparent from the plain meaning of the

language used in the constitutional grant of power. A study of the background of those constitutional provisions supports that plain meaning of the language.

It is clear, beyond argument, that men who had shaken off a tyrant's yoke, who were bitterly and angrily familiar with the overweening despotism of the tyrant's arms and the unconscionable use of the despised and feared Writs of Assistance would not seek to foster the very tyranny and oppression they had fought against in another name. The Declaration of Independence contains the following grievances and complaints against the British Crown:

> "He has affected to render the Military independent of and superior to the Civil power . . .
>
> "For depriving us in many cases of the benefits of trial by Jury . . .
>
> "For transporting us beyond Seas to be tried for pretended offenses . . . "

In declaring their independence the Colonists were at one and the same time espousing the philosophy of government that the civil power is at all times paramount and superior to the military power.

Prior even to the Declaration of Independence in the history of Anglo-Saxon liberty was the English Bill of Rights obtained in 1689 by a people who had suffered too long under the yoke of the burdensome power and oppression of large standing armies. The Mutiny Acts of England (1689 through 1789) passed each year recited that standing armies were illegal except by act of Parliament. In each Mutiny Act, in addition to the provisions for the appropriation of money for the armed force necessary for the coming year, regulations were made, separate from the civil law, for the discipline of the forces and for the prevention and punishment of mutiny. See *Kurtz* v. *Moffitt*, 115 U.S. 487, 498 *et seq.*

In Article 1, Clause 8 Congress is given the power to "raise and support armies" with the exception therein contained as to the appropriation of money for that use. The purpose of the section expresses the clear intent to prevent the establishment of a military oligarchy through the device of a large standing army. It reflects the opposition in the Constitutional Convention to large armed forces and the attendant usurpation of liberty which would swell therefrom. *The Federalist No. 41* (Madison); *The Federalist No. 8* (Hamilton).

The *armies* which the Congress is empowered to raise and support are comprised of bodies or numbers of men. *Armies* or *Army* have been repeatedly interpreted in a series of statutes dating back to the adoption of the Constitution. The constituent elements are "a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay and remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state." Winthrop, *Military Law and Precedents*, (2d Ed. 1920) p. 106. The Congress has specifically enacted legislation governing the *number* of men who comprise the United States Air Force. Act of June 10, 1950, c. 454, 64 Stat. 323, 10 U.S.C. § 208 (suspended by Act Aug. 3, 1950, c. 537, 64 Stat. 408, as amended June 19, 1951, c. 144, 65 Stat. 88). It has likewise provided that:

> "The United States Air Force shall consist of the Regular Air Force, the Air Force Reserve, the Air National Guard of the United States and the Air National Guard which is in the service of the United States; and shall include persons inducted, enlisted, or appointed without specification of component in the Air Force and all persons serving in the Air Force under call or conscription under any provision of law, including members of the Air National Guard of the several States, Territories and the District of Colum-

bia when in the service of the United States pursuant to call as provided by law." Act Sept. 19, 1951, c. 407, 65 Stat. 329, 10 U.S.C. § 1831.

It is this group of men, insofar as applicable to the Air Force, for the government and regulation of which the Congress has the power to make rules under Clause 14 of Article 1, Section 8. It is the *force* of men, the *group* of men, the *number* of men for whose government and regulation Congress has power to make military rules. There is no constitutional power in the Congress to make military rules for punishment of one who is not a member of or a part of these *forces*. At the time charges were placed against him, Toth was a civilian. He was not a member of the Air Force. He was not a member of the Regular Air Force, or of the Air Force Reserve, or of the Air National Guard of the United States, or the Air National Guard of any state in the service of the United States, at the time the Air Force attempted to subject him to the discipline which legally could be applicable only to persons comprised under those groups or *forces* of men.

Colonel Winthrop succinctly defined the personal amenability of the military person to military jurisdiction as follows:

> "It is the *general rule* that the person is amenable to the military jurisdiction only during the period of his service as an officer or soldier. Thus, in the case of an *officer*, the jurisdiction commences with the acceptance of his appointment or commission, or, where originally appointed by State authority, with his muster, (or re-appointment) into the service of the United States and ends with his death, the acceptance of his resignation, his dismissal, etc., or—if a volunteer officer—his discharge or mustering out, etc. In the case of a *soldier*, it begins with his enlistment or muster into the service and ends with his discharge or muster-out. In other words, the general rule is that *military persons*—officer and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recog-

nized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community." *Military Law and Precedents*, (2d Ed. 1920) at p. 89.

The Court of Appeals below in discussing Article 3(a) of the Uniform Code of Military Justice (64 Stat. 109, 50 U.S.C.A. § 553(a)) in the light of the power granted Congress to make "rules for the government and regulation of the land and naval forces stated: "In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed." (R. 40). Petitioner is not seeking a judicial ruling that honorable discharge is an absolution for crime. If Congress should so desire, valid legislation could be enacted making honorably discharged servicemen amenable to trial in civil courts for crimes committed while in service. See: Meyers and Kaplan, *Crime Without Punishment*, 35 Georgetown Law Journal, 303, 327. Such legislation to be valid would have to recognize the difference between those who have the status of a civilian and those who have the status of a military person and insure to the civilian his guaranteed, basic Constitutional rights and liberties.

C. The Power of Congress to Enact Legislation Providing for the Court-Martial of a Civilian is Expressly and Completely Barred by the Fifth and Sixth Amendments

Irrespective of the complete lack of legislative power in the Congress, as set forth in Article 1 of the Constitution, to enact valid legislation providing for the trial of a civilian under military law and process, the personal guarantees of the Fifth and Sixth Amendments completely bar any effort which the Congress might make to assume such power. Article 3(a) of the Uniform Code is illegal and constitutionally void because its result in this case is to de-

prive a civilian of the right to indictment by a grand jury, the right to trial by jury, the right to bail, the right to subpoena witnesses and the right to counsel of his own choosing. These rights are indefeasible rights; expressly guaranteed by the supreme law of the land to every *civilian* accused of a crime.

Article 3(a) is invalid, insofar as Toth is concerned, because, by attempting to subject him to trial by court-martial, it would deprive him of his guaranteed basic rights as a civilian under the Constitution. It has long been recognized by this Court that the rights which are afforded an accused in military law are not fundamental constitutional rights but are only such rights as Congress has provided by statute. *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Mason*, 105 U.S. 696; *Reaves* v. *Ainsworth*, 219 U.S. 296. As recently as 1953, this Court reiterated that due process of law in the military differed in material respects from due process in the civil sphere. *Burns* v. *Wilson*, 346 U.S. 139.

In pertinent part, the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces . . .".

Toth is charged with the commission of federal offenses which are capital or otherwise infamous crimes (that is, he is charged with murder in violation of Article 118 of the Uniform Code of Military Justice, 50 U.S.C. § 712, and with conspiracy to commit murder in violation of Article 81, 50 U.S.C. § 675 (R. 19)), and he is therefore entitled as of right to be proceeded against by way of indictment or presentment of a grand jury unless the charge falls within the class of cases contemplated by the phrase "arising in the land or naval forces". Unless the charge is one of that class, Congress is without power to dispense with the requirement of a presentment or indictment and Toth is entitled to all the civil benefits and guarantee of liberties set forth in the Sixth Amendment.

The phrase "except in cases arising in the land or naval forces" is clearly inapplicable to this case which arose by way of a charge instituted after Toth's connection with the military service had been severed by honorable discharge. The excepting phrase is limited on its face to those cases arising in the land or naval forces. The critical question in interpreting the phrase is: When does a *case* arise? The history of the excepting clause, the meaning of the word *case* as used elsewhere in the constitution and the cases in which the phrase has been interpreted and applied all point to the conclusion that there is no *case* until there is an accusation, charge or legal proceeding.

1. The History of the Excepting Clause of the Fifth Amendment

The excepting clause found its origin in two objectives nurtured by the citizens of the thirteen original states, namely, the desire to protect, against Federal despotism, the individual personal liberties for which they had successfully fought the Revolutionary War and the fear of a possible military dictatorship. This Court has frequently taken note of those objectives. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 at 120, this Court stated:

> "And so strong was the sense of the country of their importance, and so jealous were the people; that these rights, highly prized, might be denied them by implication that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would have been so amended as to embrace them, it would never have been ratified."

Examination of the propositions which were submitted by the various states as amendments to the original Constitution demonstrate clearly the intention that indictment by grand jury was to be preserved inviolate in the civilian population and that military justice or court-martial was applicable to the soldier only when he was *actually* in the service.

Under date of February 6, 1788, the convention of the delegates of Massachusetts in the very act of ratifying the Constitution submitted some nine amendments in the following language:

> "And as it is the opinion of this Convention that certain amendments & alterations in said Constitution would remove the fears & quiet the apprehensions of many of the good people of this Commonwealth & more effectually guard against an undue administration of the Federal Government, The Convention do therefore recommend that the following alterations & provisions be introduced in the said Constitution.
>
> . . . . . .
>
> "*Sixthly*, that no person shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury, except in such cases as may arise in the Government & regulation of the Land & Naval forces." *Documentary History of the Constitution of the United States of America*, Vol II, pp. 93-95 (Department of State, 1894).

Under date of June 21, 1788, New Hampshire in ratifying the Constitution submitted the identical provision as a proposed amendment. *Ibid*, pp. 141-143.

The language of these two proposed alterations or amendments make it quite clear that it was the intendment of the people of Massachusetts and New Hampshire that military justice could be dispensed only to those actually in the military service. Exception to indictment by grand jury applies only to "such cases as may arise in the *government* and *regulation* of the land and naval forces". *Government* of the land forces can only apply to persons actually in such forces. If a person is not in such forces, he is not a person so to be governed; he is not a part of the government of the forces; and only by violently twisting the plain meaning of the language used could it ever be argued that the intention was that all persons who were ever in such forces would be deprived of the personal right of indictment by grand jury. The people of Massa-

chusetts and New Hampshire desired it to be made a part of the supreme law of the land that their civilian citizens would be forever protected from military accusation, trial and punishment.

The constitutional convention of New York, under date of July 26, 1788, in ratifying the original constitution submitted *inter alia* the following proposed amendments and declarations:

"...

That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be under strict Subordination to the Civil Power. ...

That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such jury.[5] ..." *Documentary History of the Constitution of the United States of America, supra*, pp. 191-192.

[5] This proposed Article continues: "But in cases of Crimes not committed within any County of any of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as the Congress shall by Law direct; which County in the two Cases last mentioned should be as near as conveniently may be to that County in which the Crime may have been committed. And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defense, and should not be compelled to give Evidence against himself."

The parenthetical exception contained in the proposed New York amendment quoted above is illuminative of the thought of the framers of the Constitution. Three situations are excepted from the guarantee of indictment by grand jury, namely: (1) government of the land and naval forces, (2) the militia when in actual service, and (3) cases of impeachment. All three situations imply a status. There can be no impeachment unless there is an incumbent in a position (or status) from which he can be impeached. A judge can only be impeached while he is a judge. He cannot be impeached when he has left that position, for the very object of impeachment is removal from office. So, also the member of the militia "when in actual service" is denied the right to indictment by grand jury and the status of such a person is clear beyond cavil or argument.

There is set forth in the margin one of the proposed amendments of the ratifying convention of North Carolina[6] submitted August 1, 1788, which again recites that the exception is applicable only "in the government of the land and naval forces".

Even more clearly than the intendment of the founding fathers as expressed above, the language used in the Fifth Amendment demonstrates that no civilian citizen can be deprived of the personal guaranty of indictment by grand jury (and the concomitant right of trial by jury) by any legislative enactment. It must be borne in mind that the Fifth Amendment involves the protection of personal liberties and as this Court has said:

> "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired

[6] "8th. That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself." *Documentary History of the Constitution of the United States of America, supra*, p. 267.

> those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178.

It must likewise be borne in mind that the respondent is endeavoring to bring the proposition presented within the exception to the protected rights which flow to every citizen. This exception is premised on a tortured meaning which is ascribed to "cases arising in the land or naval forces".

2. The Meaning of the Word "Case" as Used Elsewhere in the Constitution

Section 2 of Article 3 of the Constitution states that "the judicial power shall extend to all *cases*, in law and equity, *arising* under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ." (emphasis supplied) In speaking for this Court, with specific reference to this clause, Chief Justice Marshall stated:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States." *Osborn* v. *Bank of the United States*, 9 Wheat. 738 at 819.

In the leading case of *Re Pacific R. Commission*, 32 Fed. 241, 255, Mr. Justice Fields defined "case" in these words:

"The judicial Article of the Constitution mentions cases and controversies. The term 'controversies' if distinguishable at all from 'cases' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." *Re Pacific R. Commission*, 32 Fed. 241, 255.

These definitions have been adhered to by this Court in *Muskrat* v. *United States*, 219 U.S. 346, 356 and *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, among others. Justice Fields' and Chief Justice Marshall's definitions, which have never been overruled or dissented from in this Court, encompass both civil and criminal *cases*. Likewise they encompass the meaning of the question in issue, i.e., when does a *case arise*? In a criminal case the claim of a party who has a wrong to be punished or a claim to be redressed never takes such form that the "judicial power is capable of acting upon it" until an accusation or charge has been made. Under this definition a *case* can only *arise* in the land or naval forces when an accusation has been made or the criminal charge filed against the soldier. It is the filing of the accusation, the making of the charge which makes the *case*.

It is interesting to note that in the case of *Counselman* v. *Hitchcock*, 142 U.S. 547, 563, the Government took the position before this Court that a "criminal case" as used in the self-incrimination clause of the Fifth Amendment "could arise only when an indictment should be returned".

This Court, following the philosophy previously announced in *Ex parte Lange, supra,* that constitutional guarantees should always be interpreted liberally in favor of an accused, held:

> "A criminal prosecution under Article 6 of the amendments is much narrower than a 'criminal case', under Article 5 of the amendments. It is entirely consistent with the language of Article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury." 142 U.S. 547, 563.

It is clear that this Court did not intend to depart from the meaning of the word "case" previously adopted. This was made evident when in the year following its decision in *Counselman* v. *Hitchcock*, this Court decided *United States* v. *Patterson*, 150 U.S. 65, and in that latter case stated:

> "A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated. It is true the popular understanding of the term is "accusation", and it is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise; but in legal phraseology it is properly limited to such accusation as have taken shape in a prosecution. In the eyes of the law a person is charged with a crime only when he is called upon in a legal proceeding to answer to such a charge. Mere investigation by prosecuting officers, or even the inquiry and consideration by examining magistrates of the propriety of initiating a prosecution, do not of themselves create a criminal charge." 150 U.S. 65, 68.

Speaking further of this definition the Court added:

> "There is nothing in the case of *Counselman* v. *Hitchcock*, 142 U.S. 547, which militates against the views herein expressed. In that case a distinction was drawn between the terms 'criminal case' in the 5th Amendment to the Constitution, and 'criminal prose-

> cution' in the 6th Amendment and the former, *for the protection of the citizen*, given a broad construction so as to include investigations before a grand jury. The limitation placed upon the term 'criminal prosecution' coincides with that here given to 'criminal charges'." 150 U.S. at 69. (Emphasis added)

Following this philosophy of interpreting the provisions of the Fifth and Sixth Amendments broadly so as to protect the rights of the citizen, petitioner submits that the word *cases*, as used in the excepting clause of the Fifth Amendment, must be given a narrow meaning. If this philosophy of interpretation is departed from in this case and the word *cases* as used in the excepting clause is held to have a meaning synonymous with *events* the constitutional guarantee of indictment by grand jury would be rendered meaningless and nugatory. Petitioner submits that *cases* as used in the excepting clause has the same meaning which it has when used in the judicial sense, and that its meaning is synonymous with the meaning given the phrase "criminal charge" in *United States* v. *Patterson, supra.*

3. Interpretations Given the Word "Case" as Used in the Excepting Clause of the Fifth Amendment

No decision of this Court has been found defining the word "cases" as used in the excepting clause of the Fifth Amendment. In the lower federal courts there are some decisions holding that the word "cases" is synonymous with the word "events". *In re Bogart*, 3 Fed. Cas. 796 (C.C.D. Calif. 1873); *Ex parte Joly*, 290 Fed. 858 (S.D. N.Y. 1922); *Terry* v. *United States*, 2 F. Supp. 962 (W.D. Wash. 1933); *United States* v. *Hildreth*, 61 F. Supp. 667 (E.D.N.Y. 1945); *Kronberg* v. *Hale*, 180 F.(2d) 128 (C.C.A. 9th, 1950). Other lower federal courts have followed the reasoning that a case does not arise until a charge is filed or a legal proceeding is instituted. See e.g., *Ex parte Wilson*, 33 F.(2d) 214 (D.C.E.D. Va. 1929);

U.S. ex rel. Viscardi v. *MacDonald*, 265 F. 695 (D.C.E.D. N.Y. 1920); *U.S. ex rel Santantonio* v. *Warden*, 265 F. 787 (D.C.E.D.N.Y. 1919); *U.S ex rel Flannery* v. *Commanding General*, 69 F. Supp. 661 (D.C.S.D.N.Y. 1946). This latter is obviously the better view. Certainly few will be found who will follow the mental prestidigitation indulged in by the court of appeals in this case when it said:

> "The Government says a case arises when the crime is committed; hence the Constitution itself excepts the present case from requirement for indictment. It seems to us that, although a crime does not become a case, i.e., a legal proceeding, until a charge is made, a case *arises* when the crime is committed: just as a man is born on the day of his birth, although he is not a man until many years thereafter." (R. 41)

This interpretation of the excepting phrase makes the protection and guarantee of the amendment a nullity. This interpretation is antithetical to the holdings of this Court that the provisions of the Constitution be interpreted in such manner as to give the broadest protection to the rights of the citizen. See, e.g., *Ex parte Lange, supra.* Furthermore the analogy of the appellate court is inapposite and, if it supports anything, supports petitioner's proposition rather than respondent's. For, while it is true that every man is born on the day of his birth, it is equally true that every child does not become a man. The rights which manhood (adulthood) confer are not rights arising at birth; they are rights acquired when manhood is reached. Every child, from date of birth, does not possess an inchoate right to vote or enter into a binding contract, etc.; these rights *arise* in the person when the status of manhood is achieved. So it is also with a *case.* Occurrences or events which give rise to a case always occur prior to the institution of legal proceedings. In the civil law the cause of action accrues, in the criminal law the crime is committed, but no *case* arises until the judicial proceeding is instituted.

It would appear that the court of appeals below in accepting the proposition that a case arises when a crime is committed gave great weight to the fact that this Court had never had occasion to strike down the Act of March 2, 1863 (12 Stat. 696, re-enacted as Article of War 60, Rev. Stat. § 1342 (1878); Article of War 94, 41 Stat. 805 (1920), amended 62 Stat. 640 (1948)), which provided in substance that a person accused of committing fraud against the Government while in the military service would still be amenable to arrest and trial by court-martial for such offense notwithstanding his discharge from service.[7] It would likewise appear that the court below gave great weight to the fact that other federal courts had upheld the validity of this Act. (R. 41-42). The leading case standing for the constitutionality of the Act of March 2, 1863 and the one which is referred to and adopted as precedent in subsequent decisions of the lower federal courts, is that of *In re Bogart*, 3 Fed. Cas. 796 (C.C.D. Calif. 1873). It is in this *Bogart* case that the word "cases", as used in the excepting clause of the Fifth Amendment, is held to mean "events". It is difficult, if not impossible, to reconcile the reasoning of this case with the decision of this Court, in *Ex parte Milligan, supra*, decided some six years before, and with the decision of this Court in *Osborn* v. *Bank of the United States, supra*, wherein the word "cases" had been defined and given a meaning not in any manner compatible or synonymous with "events".

Examination of the *Bogart* case will show that Robert D. Bogart served as a paymaster clerk in the United States Navy and was charged with embezzlement of naval funds. He was sued for civil damages and the statutory penalty of $2000.00 under the third section of the Act of March 2, 1863, in the District Court for the Eastern District of

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[7] Reference to the Senate debate shows that the Act of March 2, 1863, was proposed and passed as a wartime measure and grave doubts were expressed by Senators present as to the Constitutionality of the bill. See *Cong. Globe*, February 14, 1863, 37th Cong. 3d Session, pp. 952-957.

New York. (See: *U.S. ex rel. Marcus v. Hess,* 317 U.S. 537). In that case Bogart interposed the defense that he could not be subject to the civil penalty of $2000.00 because he was a member of the naval service and as such was liable to trial by naval court-martial and this position was sustained by the court. *United States v. Bogart,* 3 Ben. 257, 24 Fed. Cas. 1184 (D.C.E.D.N.Y. May 1869). Subsequently Bogart was arrested in California by naval authority to be held for court-martial on the same charge of embezzlement and on the charge of desertion. Bogart then petitioned the Circuit Court for the District of California for a writ of habeas corpus alleging that naval court-martial had no jurisdiction over him because he had been discharged from the naval service. Upon the return alleging desertion from the service and not discharge as contended by the petitioner, the court held that the court-martial had absolute jurisdiction over him. With respect to the question of discharge, the court likewise held that a person's subsequent discharge from the service will not prevent him from being court-martialed for an offense committed during his prior military service. The court adopted a dictionary definition of the word "cases" as used in the excepting clause of the Fifth Amendment and held that it meant "events". Under the court's reasoning the former military person is always subject to trial by court-martial for any "event" or crime which occurred while he was in service, notwithstanding subsequent discharge prior to the institution of criminal charges or proceedings. *In re Bogart,* 3 Fed. Cas. 796, 800-801 (C.C.D. Calif. 1873). From this broad basis it would necessarily follow that the Act of March 2, 1863 was not violative of the rights guaranteed by the Fifth Amendment insofar as that Act permitted the court-martialing of discharged military personnel for offenses of fraud or embezzlement committed while in service.

In the final analysis the *Bogart* case and those which follow it, stand for nothing more than that the word

"cases" as used in the Fifth Amendment means "events". This is a proposition which has never been followed or adopted by this Court and, as set forth above, is a definition which is completely contrary to the meaning which has been given the word in other sections of the Constitution.

Likewise the decision in the *Bogart* case is irreconcilable with the decision of this Court in *Ex parte Milligan*, wherein it is held:

> "The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and, *while thus serving*, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance and cannot be frittered away on any plea of state or political necessity." 71 U.S. 2 at p. 123 (1866) (emphasis supplied).

In sharp disagreement with the *Bogart* case is the decision in *Ex parte Henderson*, 11 Fed. Cas. 1067 (C.C.D. Ky. 1878), decided with full knowledge of the *Bogart* opinion. In the *Henderson* case the petitioner (for writ of habeas corpus) was a civilian who was being held for court-martial for alleged fraud arising out of a contract with the government in violation of the Act of March 2, 1863. In discharging the petitioner from custody the court held in dealing specifically with the Act of March 2, 1863 that any attempt on the part of Congress to provide for

the court-martial of any person not actually in the land or naval forces was unconstitutional. 11 Fed. Cas. 1067, 1075 *et seq.*

With the exception of the *Bogart* case and the few cases cited above which follow it, it has been almost axiomatic in the view of the courts, including this Court, that only those persons who are actually in service are amenable to military trial and justice. In *Reaves* v. *Ainsworth*, 219 U.S. 296 at 304 it was stated: "To those *in* the military or naval service of the United States the military law is due process." (emphasis supplied) In *Ex parte Quirin*, 317 U.S. 1 at 41 this Court assumed without deciding, that under the Fifth Amendment, courts-martial did not apply to persons not in the service. See also: *Hirshberg* v. *Cook*, 336 U.S. 210.

Likewise there is plentiful authority in the decided cases for the proposition that discharge (or dismissal) from military service is a bar to any military prosecution for offenses previously committed while the accused was in service. *Hirshberg* v. *Cooke*, 336 U.S. 210; *Ex parte Wilson*, 33 F. 2d 214 (D.C.E.D.Va. 1929); *U.S. ex rel. Viscardi* v. *MacDonald*, 265 F. 695 (D.C.E.D.N.Y. 1920); *U.S. ex rel. Santantonio* v. *Warden*, 265 F. 787 (D.C.E.D. N.Y. 1919); *U.S. ex rel Flannery* v *Commanding General*, 69 F. Supp. 661 (D.C.S.D.N.Y. 1946) wherein it was explicitly held that Article of War 94, 10 U.S.C. § 1566 (based on Act of March 2, 1863) was unconstitutional; *Ex parte Reaves*, 121 Fed. 848, 859.

D. Article 3(a) of the Uniform Code of Military Justice Deprives the Civilian Citizen of All Personal Rights Guaranteed in the Constitution

It is earnestly submitted that this Court cannot sustain the decision of the court of appeals in this case without destroying its own landmark decision in *Ex parte Milligan, supra.* Until now there has been full confidence that the *Milligan* case had preserved for all time the personal liberties guaranteed by the Fifth and Sixth Amend-

ments and that no mere act of Congress could effectively deny or deprive the civilian citizen of the protections afforded by those guarantees.

The principal effect of Article 3(a) of the Uniform Code of Military Justice, however, is to destroy completely those liberties insofar as a large segment of the people of this land are concerned. Under Article 3(a) a small or large segment of the citizens of this Country, size being dependent only upon the whim or caprice of military authority, can be deprived of those guarantees. This is not the fanciful, fearful imagining of petitioner or argument based on an unknown phantom bogey-man in the closet. This is real. This very case reveals completely and fully how those rights are denied to Robert W. Toth. This very case demonstrates, more effectively than can any words of counsel attempting to delineate future fears, that military use of Article 3(a) actually deprives a civilian citizen of constitutional privileges and rights previously thought to be sacred.

Even as the shepherd's shears denude the sheep of its protective coat of wool, so also has the United States Air Force acting by virtue of Article 3(a) deprived or sought to deprive Robert W. Toth of his right to be free from an unreasonable seizure, of his right to bail, of his right to an indictment by a grand jury, of his right to a trial by jury, of his right to subpoena witnesses to testify on his behalf, of his right to a prompt preliminary hearing, and of his right to counsel of his own choosing.

The Fifth Amendment provides that no person shall be "deprived of life, liberty or property, without due process of law". Is it due process to arrest a civilian in Pittsburgh, Pennsylvania, and to fly him, without affording a hearing or opportunity for hearing, to Korea, a foreign land some 13,000 miles away? Is it due process for armed soldiers to arrest a civilian as he enters his place of employment and to fly him to Korea some 13,000 miles away? Is it due process which would permit of no judicial inquiry into such conduct? If the Fifth and Sixth Amendments are the shields of our citizenry against oppression

of personal liberty, wherein lies their strength unless used to protect them from the conduct in question in this case?

In *Wong Wing* v. *United States*, 163 U.S. 228, this Court had before it the case of a Chinese alien who had been imprisoned on summary proceeding under a statute which provided that unlawful residence in this country was a crime punishable by one year at hard labor upon summary hearing before a justice, judge or commissioner. In striking down this provision as being constitutionally invalid this Court stated:

> "Applying this reasoning to the 5th and 6th Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those Amendments, and that even aliens shall not be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."

If Congress cannot validly deprive the alien who is illegally in this country of these rights, the logical question is wherein lies the power to deprive the civilian citizen of those same rights? It is submitted that Congress has no such power.

II. THERE IS NO PROVISION IN THE UNIFORM CODE OF MILITARY JUSTICE WHICH AUTHORIZES THE APPREHENSON, CONFINEMENT AND TRIAL BY COURTS-MARTIAL OF CIVILIANS WHO HAD FORMERLY BEEN IN MILITARY SERVICE, BUT WHO HAD BEEN DISCHARGED PRIOR TO ANY ACCUSATION BEING MADE AGAINST THEM.

A. Despite a Legislative Purpose Expressed in Article 3(a) to Make the Honorably Discharged Civilian Amenable to Trial by Courts-Martial, Congress Failed to Enact Legislation Necessary to Permit Such a Person to be Held for Trial or to be Tried in Such a Manner

Even if it could be conceded that Congress had the authority under the powers granted it by Article 1 of the Constitution to enact legislation making civilians amenable

to military prosecution and even if it could be conceded that there was no bar in the Constitution in the form of the liberties and rights granted to all civilians by the Fifth and Sixth Amendments, the Uniform Code of Military Justice fails to provide for the apprehension, arrest, detention or confinement of civilians whom Congress attempted to make amenable to military law.

Petitioner does not concede the *power* of Congress to enact valid legislation of the type now under consideration. Petitioner does concede that the purpose of Article 3(a) is to permit trial by court-martial of discharged servicemen. Under this aspect of the case petitioner's position is that there is a failure of legislation in that there is no provision expressed or implied in the Uniform Code which would permit the arrest and confinement of civilians by the military.

In broad terms Article 3(a) provides that discharge from military service does not relieve a person from amenability to trial by courts-martial for a crime committed while in service. There is no language in Article 3(a) which, by broadest implication, provides for the arrest, taking into custody, or confinement of such a person. Article 3(a) merely details that such person is not relieved from amenability to trial by courts-martial notwithstanding the fact that the military status is terminated. The district court below in considering this phase of the case, in granting the writ of habeas corpus and in discharging Toth from custody held that there is an omission in the military code in that no provision is made for the arrest and detention of civilians.

B. There is no Legislation Enacted by the Congress Which Authorizes the Confinement or Physical Restraint of an Honorably Discharged Civilian by the Military

The correctness of the district judge's reasoning is made evident by examination of Article 9 of the code which deals with the "arrest", "apprehension" and "confinement" of persons subject to the Code.

Article 9(a) provides in pertinent part that:

"Confinement is the physical restraint of a person." At this juncture it should be made clear that Toth was in confinement from the moment of his arrest (in civilian terminology) or apprehension (in Air Force terminology) by military police on May 13, 1953 until he was discharged from custody by order of the district court on September 3, 1953.

Article 9(c) provides in pertinent part that ". . . a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated." Plainly, Toth, as a civilian, had no commanding officer "to whose authority he is subject", and plainly there was no one who could legally order or effectuate his confinement or physical restraint.[8] Toth's connection with the service had been completely and finally severed upon his honorable discharge. The record shows that court-martial charges were filed against Toth over the signature of a Colonel Hurst (R. 17) and that no further action was taken by any alleged "commanding officer"; but, on the contrary, the Acting Secretary of the Air Force, who is not a commanding officer but a civilian, consented to the court-martial charges and ordered the Air Provost Marshal to effect Toth's apprehension. (R. 19-20)

Petitioner assumes that the word "arrest" as used in Article 9 means exactly what Article 9 says it means, that is, *restraint by order*. Confinement is likewise defined in

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[8] *The Manual for Courts-Martial, United States, 1951*, § 21(a) at p. 25 defines commanding officer as follows: "For this particular purpose the term 'commanding officer' shall be construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, Naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to appoint a summary court-martial."

Article 9 as the "physical restraint of a person", which is something that is not effectuated by simple order.[9] Toth was confined; he was physically restrained of his liberty by the Air Force and there was no commanding officer who could order such physical restraint. There can be no argument that Toth was not being confined at the time the petition for writ of habeas corpus was filed and this fact was admitted by respondent in his "Return and Answer To Rule to Show Cause". (R. 8)

Article 9(c) specifically provides for the confinement or *physical restraint* of civilians and there is and can be no denial of the fact that Toth was a civilian. Even if there were such a denial of such civilian status, Article 3(a) would make such a denial absurd by its reference to "termination of status". It must be clear beyond peradventure of doubt that when the military status terminates there is an *instanter* reversion to civilian status.

C. There is no Legislation Enacted by the Congress Which Authorizes the Apprehension or Arrest of an Honorably Discharged Civilian by the Military for an Offense Committed Prior to Discharge

The respondent would apparently argue that Article 7 conveys the authority to apprehend Toth and would likewise apparently argue, notwithstanding the clear provisions of Article 9 governing confinement, that Article 7 conveys the necessary authority to restrain him of his liberty. It is petitioner's position (1) that Article 7 does not authorize Toth's apprehension, and (2) even if it did, there is no authority to hold him in custody once his apprehension has been effected.

It is the clear purport and intent of Article 7 that the power to apprehend contained therein is but a statutory authorization to the military to permit the same type of ar-

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[9] "Sec. 20(c) *Confinement Prior to Trial.*—As used in this chapter, confinement is physical restraint imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges . . ." *Manual For Courts-Martial, United States, 1951* at p. 24.

rests in the military field that is permitted an arresting officer in the civilian sphere acting *without a warrant*. It is well settled that the peace officer may, without a warrant, arrest for a felony or for a misdemeanor involving a breach of the peace committed in his presence, or, if the offense is not committed within his presence, upon the reasonable belief that such an offense has been committed and that the person arrested committed it. 4 *Am. Jur., Arrest*, Sec. 22. It is this authority and this authority alone which is granted military "peace officers" by Article 7. Article 7 reads:

> "(a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial therunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." (50 U.S.C. (Supp. V) 561).[10]

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[10] "19. APPREHENSION.—a. Who may apprehend.—All officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties, air police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties, are authorized to apprehend, if necessary, persons subject to the code or subject to trial thereunder upon reasonable belief that an offense has been committed and that the person apprehended committed it. See Article 7b.

Petty officers, noncommissioned officers, and enlisted persons performing police duties should apprehend a commissioned or a warrant officer offender only pursuant to specific orders of a commissioned officer, except where such action is necessary to prevent disgrace to the service, the commission of a serious offense, or the escape of one who has committed a serious offense. In all cases involving the apprehension of officers and warrant officers by petty officers, noncommissioned officers, and enlisted persons performing police duties, the individual effecting the apprehension will, immediately after such apprehension, notify the officer to whom he is responsible or an officer of the air police, military police, or the shore patrol." *Manual For Courts-Martial, United States, 1951*, p. 22.

Nothing could be clearer from this language and the regulations issued under it that this Article never contemplated a "holding in custody" and never contemplated anything more than the temporary securing of the person of an alleged offender. This is made even more certain by reference to regulation 19(d) promulgated under Executive Order 10214, issued February 8, 1951, which reads:

> "d. *Securing custody of alleged offender.*—There is a clear distinction between the authority to apprehend and the authority to arrest or confine. Any person empowered to apprehend an offender *is authorized to secure the custody of an alleged offender until proper authority may be notified*, the limitations (21a; Art. 9) on the power to arrest or confine notwithstanding." *Manual For Courts-Martial, United States, 1951*, p. 23 (16 F.R. 1303-1469). (emphasis supplied)

If it be assumed (though this is not conceded) that Toth was properly apprehended by Air Force police in Pittsburgh on May 13, 1953, what then would be the function of the military police under the code and regulations? *To hold him until proper authority was notified.* And who was proper authority? He had no commanding officer. He had no authority which could order his confinement. There was no statutory power to restrain him of his liberty. Indeed the air force police under the law, stretched as far as it can be to support their action, had no alternative but to release Toth from custody.

It is assumed that the respondent will argue that Congress would not legislate in such a confounding or abortive manner. The short answer to this is that Congress did so legislate.

It is assumed that the respondent will also argue that the new Uniform Code of Military Justice, in this part at least, is but a re-enactment of the Act of March 2, 1863, 12 Stat. 696, discussed previously. But that Act specifically held that, notwithstanding the discharge or dismissal of the person who in military service had violated the Act,

he "shall . . . *continue to be liable to be arrested and held for trial and sentence by a court-martial* . . . ." (emphasis supplied) And again the short answer is that that Act and the succeeding amendments and reenactments contained the express authority to arrest (apprehend) and hold for trial (confine). What the Act of March 2, 1863 did explicitly, the Uniform Code does not even do by implication.

It is the position of petitioner that Toth, the accused, was not a person "subject to the code" who could be apprehended by military authority under the provisions of Article 7(b). *Persons subject to this code* is a phrase of definite meaning. Article 2 of the Uniform Code enumerates twelve categories of persons who are subject to the code, but does not set out that the honorably discharged serviceman is such a person. Since Toth does not fit into any of the categories of persons who are subject to the code he is clearly not a person who can be apprehended by military police under the provisions of Article 7(b).

III. THE APPREHENSION AND CONFINEMENT OF A CIVILIAN CITIZEN BY MILITARY AUTHORITIES FOR TRIAL BY COURT-MARTIAL IS COMPLETELY DEVOID OF ANY SANCTION IN LAW AND IS COMPLETELY FOREIGN TO THE CONCEPTS OF THE GUARANTEES OF PERSONAL LIBERTY WHICH ARE EMBODIED IN THE CONSTITUTION.

In light of the history of Colonial days which gave rise to the American Revolution, in light of the clear limitation on the powers of Congress embodied in Article 1, Section 8, clause 14 of the Constitution, in light of the guarantees of personal rights and liberties so clearly set forth in the Fifth and Sixth Amendments, this case and the events which gave rise to the filing of the petition for writ of habeas corpus in the district court completely beggars the imagination. It is startling to conceive of any action or activities which could be more foreign to our cherished American heritage and our basic ideals of government than the action and activities in which the military power of our Air Force has indulged in arresting without war-

rant, in transporting to a foreign country without hearing, and in confining there for trial by court-martial, without any authority of law, a civilian citizen of this country.

While guilt is sincerely and wholeheartedly denied, the issue which is presented for consideration and determination is not the guilt or innocence of Robert W. Toth. The issue is whether the Constitution is yet the shield of our liberty; still the bulwark of due process of law; still the bastion of protection of the rights of our citizens from overweening military despotism. In another day and in another case this Court stated the issue in the following words:

> "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured: withdraw that protection and they are at the mercy of wicked rulers, or the clamor of an excited people . . . . . " *Ex parte Milligan*, 71 U.S. 2, 118-119.

Even if it be conceded that in enacting Article 3(a) Congress was only attempting to provide that an honorable discharge from military service would not be an absolution for crimes previously committed, the Code is fatally defective. Such a purpose, no matter how noble may have been the thought which engendered it, is not sufficient to provide a vehicle for overriding the Constitution. Likewise, this noble purpose has by its very enaction provided an insidious vehicle for military dictatorship. If this case opens the door and permits the miliary trial of civilians

other factors and facets of the Code, looked to as a whole, must be considered. It is apparent that Congress in enacting Article 3(a) intended to cover only serious crimes, that is crimes involving maximum punishments of confinement of five or more years. But in reality even the most petty offenses can be included and actually are now included.

Under Article 56 the President is empowered to prescribe the punishments for offenses listed under the Code and under Executive Order 10214 a Table of Maximum Punishments was set out. *Manual For Courts-Martial, United States, 1951,* p. 219. In time of war this Table is automatically suspended as to certain offenses. *Ibid* p. 217, par. 127c. Further, the Table was suspended in the Far East Command (where Toth served) under date of May 29, 1951 by Executive Order 10247 with reference to punishments for violations of Articles 82, 85, 86(3), 87, 90, 91(1) and (2), 113 and 115. As a result a discharged serviceman would be subject to court-martial under Article 3(a) for such petty offenses as One Day Absence Without Leave (Article 86(3)) and Missing Movement (Article 87).

It is felt that this point need not be elaborated further. Deprecation of the power or avowal of the proposition that it will be used benignly and sparingly does not diminish or pale the incipient denial of civil liberties to millions of American citizens which is fostered by the Code. The Constitution is our protection against tyranny; the benign tyrant is equally objectionable to it as the evil one.

CONCLUSION

For the reasons hereinabove stated petitioner prays that the judgment of March 25, 1954 of the United States Court of Appeals for the District of Columbia Circuit be reversed; that the order of September 3, 1954 of the United States District Court for the District of Columbia be sustained; and that the mandate of this Court issue

directing that Robert W. Toth be released and discharged from the custody of respondent.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 68-53

AUDREY M. TOTH, *Petitioner*

versus

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

Judgment of Release and Discharge

Upon consideration of the Petition of Audrey M. Toth, sister of Robert W. Toth, the Writ and Answer of Respondent and upon consideration of the Motion to Discharge Writ of Habeas Corpus, Dismiss Petition and Remand Petitioner to Custody of Respondent filed herein on behalf of the Respondent, and the Petitioner's opposition thereto, and the briefs of both parties and argument of counsel in open court, it is by the Court this 3rd day of September, 1953,

ADJUDGED AND ORDERED that Respondent's Motion to Discharge Writ of Habeas Corpus, Dismiss Petition and Remand Petitioner to Custody of Respondent be and the same is hereby overruled, and it is further

ADJUDGED AND ORDERED that the Writ of Habeas Corpus herein is hereby sustained and that Robert W. Toth be and he hereby is released and discharged from the custody of the Respondent.

/s/ ALEXANDER HOLTZOFF
Alexander Holtzoff
Judge

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No. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH,
Petitioner

v.

DONALD A. QUARLES, SECRETARY OF THE UNITED STATES AIR FORCE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM OF RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM OF RESPONDENT

Respondent's Supplemental Memorandum was apparently submitted to answer the query: Who is civilian Toth's commanding officer *to whose authority he is subject* and who can order his arrest or confinement? This question was addressed to the specific meaning of Article 9(c) which provides that "a civilian subject to this code may be ordered into arrest or confinement *only by a commanding officer to whose*

authority he is subject, by an order, oral or written, delivered in person or by another officer. The *authority* to order such persons into arrest or confinement *may not be delegated.*" (Emphasis supplied)

It would appear that respondent's effort, in the supplemental memorandum, to answer this basic question is nothing more than logomachy. Respondent consistently, in a vain effort, to make his point, picks and chooses from parts and portions of Articles 3(a), 7 and 9(c); admitting in one part that Toth has no commanding officer to whose authority he is subject, yet, nevertheless, still asserting that somehow, somewhere there is military authority over him.

Stripped of verbiage respondent's memorandum seeks to elucidate the proposition that (1) the Secretary of the Air Force is a "commanding officer" who could *order* Toth's confinement (Resp. Memo. 16), and (2) that the Commanding General of the Fifth Air Force in Korea actually ordered Toth's confinement on orders of the Secretary of the Air Force (Resp. Memo. 14).[1] More essentially respondent's case is based on the proposition that the Secretary of the Air Force is an appropriate "commanding officer" within the meaning of the Military Code.

---

[1] Petitioner was apprized for the first time from the information set forth in the footnote on page 14 of respondent's memorandum that Toth's confinement was *ordered* by the Commanding General of the Fifth Air Force. Needless to say petitioner has never been advised that such order was ever delivered to Toth as is required by the express provisions of Article 9(c). Moreover, the fact that a written order was made does not establish *authority* to issue the order. To argue otherwise, as respondent attempts to do, is sheer sophistry.

I

The fallacy of respondent's basic premise is easily and quickly demonstrated.

First: The Secretary of the Air Force is not a "commanding officer" within the meaning of Article 9(c) because by definition he cannot be classified as an "officer" in the military sense and in the sense in which that word is used in the Uniform Code. Article 1(5) specifically defines the term as follows:

> "'Officer' shall be construed to refer to a *commissioned officer* including a commissioned warrant officer." (Emphasis supplied)

There can be no gainsaying the fact that the Secretary of the Air Force does not fit this definition. The Secretary of the Air Force is not, perforce his appointment to that office, a commissioned officer of the Air Force.

Second: Respondent would seek to argue that the Secretary is a commanding officer as specified in Article 9(c), because he fits the definition of "commanding officer" as that term is defined in paragraph 21(a) of the *Manual for Courts-Martial, United States* (Cf. Pet. Br. 39, fn. 8). Respondent argues that the Secretary fits this definition because he is an "officer commanding or in charge of any other command who, under Article 24, has the power to appoint a summary court-martial". Respondent disregards completely the fact that "officer" has been defined otherwise in the Code (Article 1(5)) and likewise disregards completely the fact that when considered in context "commanding officer" as used in paragraph 21(a) of the *Manual* means an officer who is in command of troops or "other place

where members of the armed forces are on duty". Likewise, critical analysis of paragraph 21(a) of the *Manual* and Articles 22, 23 and 24 of the Code demonstrates that the "commanding officer" referred to in paragraph 21(a) of the *Manual* does not refer to the President or the Secretary of a Department, but refers to "commanding officers" as specifically listed in Article 22(a)(3) through (7), Article 23(b)(2) through (7) and Article 24(a)(2) through (4).

Third: The most baseless argument which respondent presents is that the Secretary of the Air Force is a "commanding officer" within the meaning of Article 9(c) because ". . . the Secretary's command is, of course, the entire Air Force". (Resp. Memo. 16, footnote)

Section 626, Title 10, U.S.C. specifically provides that the Secretary of the Air Force shall be appointed from *civilian life* by the President. This civilian Secretary is the head of the Department of the Air Force but he is not in command of the United States Air Force. The officer in command of the United States Air Force is the Chief of Staff of the United States Air Force, a commissioned officer. Compare 10 U.S.C. 626 and 10 U.S.C. 626(c). This point need not be labored. The difference between the Secretary as the *civilian head* and the Chief of Staff as the *commanding officer* of the Air Force is ineluctably demonstrated by examination of Section 626-1(c) of Title 10, U.S.C. which provides:

> "If the Chief of Staff, by reason of succession assumes, or if he or any other officer of the Air Force is designated in accordance with Section 6 of this title, to perform the duties of the Secretary of the Air Force, Section 576 of Title 10 shall not apply

to him by reason of his temporarily performing such duties."[2]

Petitioner notes respondent's assertion that "It would come as a stunning surprise to those in the Air Force to learn that a lieutenant commanding an 'auxiliary airfield' has a power to order arrest or confinement which is denied to the Secretary."[3] (Resp. Memo. 16, footnote) The short and complete answer to this assertion is that the surprise, if surprise there be, arises not from any suggestion of petitioner, but arises by virtue of Congressional legislation. The Congress and not petitioner has the power "To make rules for the government and regulation of the land and naval forces." The Congress has made it definite and clear that the Secretary is not a commanding officer.

II

While respondent asserts that Toth was "ordered" into confinement by the Commanding General of the Fifth Air Force, he nevertheless recognizes that such Commanding General had no power, jurisdiction or authority to order such confinement unless such authority was conferred or given by a higher authority in the hierarchy of command. (Resp. Memo. 13-14) It is apparently conceded by the respondent that the

---

[2] 10 U.S.C. § 576 provides: "No officer of the Army on the Active list shall hold any civil office, whether by election or appointment and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army and his commission shall be thereby vacated".

[3] *Quaeritur:* Would it likewise "come as a stunning surprise to those in the Air Force to learn "that the Fifth Amendment guarantees the civilian citizen the right of indictment by grand jury and the concomitant rights of a trial by petty jury, bail, etc., when accused of a crime?

Commanding General of the Fifth Air Force was not Toth's commanding officer who could, without more, order his confinement under Article 9(c). Whatever authority this officer had over Toth must, according to respondent's argument, be derived from authority conferred by a higher source, namely, the civilian head of the Department of the Air Force.

Since the civilian Secretary is demonstrably proven not to be a "commanding officer" and, more importantly, not the commanding officer of a civilian who had absolutely no connection with the military, respondent's major premise collapses. If the civilian Secretary did not himself have authority to order the confinement, he cannot confer the authority. *Nemo dat qui non habet.*

Furthermore, Article 9(c) provides that the authority to order confinement may not be delegated. Yet respondent's *reductio ad absurdum* is to argue delegation of this non-delegable authority merely to effectuate confinement.

III

Petitioner recognizes full well that the basic issue presented by this case is whether or not the Congress may, without violating the Constitution, enact the legislation which is under consideration herein. But this basic issue cannot be considered in a vacuum. It is important to recognize that the end object of the legislation is to deprive the civilian citizen of the basic rights guaranteed him by the Fifth and Sixth Amendments. Critical analysis of the provisions of the Uniform Code is pertinent to the basic constitutional question inasmuch as such analysis demonstrates the vagueness and indefiniteness of the legislation which is

sought to be used as a vehicle for making *military justice* superior and paramount to civil authority.

To put the importance of the analysis of the provisions of the Uniform Code in another way, perhaps, had the Congress addressed itself to the proposition of filling in the details of authority of the military to court-martial civilians it would have become appreciative of the basic invalidity of its effort.

Respectfully submitted,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN LEGION, AMICUS CURIAE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN LEGION, AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed by The American Legion, Amicus Curiae, with the consent of the parties to this action, as required under Rule 42 (1), Revised Rules of the Supreme Court, effective July 1, 1954.

The American Legion is a non-political civilian organization composed of veterans of World War I, World War II and the Korean hostilities originally chartered by Act of Congress September 16, 1919 (U.S.C.A. Title 36, Sections 41-51, inclusive).

It is composed of fifty-eight (58) Departments, forty-nine (49) of which are located within the continental limits of the United States, which, in turn, are organized into Post or chapter organizations; and at the present time there are 17,195 Posts with a total membership of 2,779,964.

One of the cardinal purposes of the Legion, as provided by the Act under which it was incorporated (U.S.C.A. Section 43 as amended), is "To uphold and defend the Constitution of the United States of America." This is also the first precept in the Preamble to the Legion's Constitution. Consequently, it is vitally interested in seeing that the constitutional rights of veterans are fully protected.

The Petition for a Writ of Certiorari raises a number of questions which call for an interpretation of the Uniform Code of Military Justice (64 Stat. 107-145, 50 U.S.C.A. Section 551, et seq.) and the constitutional rights of veterans who have been honorably discharged from the Service and returned to a civilian status, but who may be charged thereafter with an offense under Section 3a of said code. The Legion fully supports the Petition and the reasons advanced by the Petitioner therein in support thereof.

Inasmuch as the parties have supplied the Opinions below, the jurisdiction of the Court, the questions presented, the full text of the relevant statutes involved, the statement of the case and its disposition, we shall avoid repeating them herein.

ARGUMENT

The basic question presented by the Petition for Writ of Certiorari is one of jurisdiction of the United States Air Force over the accused, Robert W. Toth. Under the Fifth Amendment "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, * * *."

Robert W. Toth had received an honorable discharge from the United States Air Force on December 9, 1952 (R. 12). He had served in Korea. On April 9, 1953, court martial charges were filed against him, accusing him of murdering and with conspiracy to commit murder against a Korean National. On May 13, 1953, which was several months after his honorable discharge and return to civilian life, he was arrested by the Military Forces and transported to Korea in connection with these charges. In view of the fact that the charges were not instituted until after the Petitioner had become a civilian, the very important question is presented as to whether the case arose in the land forces under the Fifth Amendment. While the Supreme Court, to our knowledge, has not construed this provision of the Fifth Amendment, yet it has interpreted the word "cases."

In Marbury v. Madison, 1 Cranch 137, Chief Justice Marshall defined a case as a suit instituted according to the regular course of judicial procedure.

Again in Osborn et al. v. The Bank of the United States, 9 Wheat. 738 at page 819, Chief Justice Marshall, after quoting from the first section, Third article of the Constitution declaring the extent of the judicial power of the United States, said:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

We can see no reason why there should be a different interpretation of the word "cases" under the Fifth Amendment than given that word under Article III of the Constitution.

In Ex Parte Richard Quirin (1942), 317 U. S. 1, at page 41, this Court stated:

> "We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one 'arising in the land . . . forces,' *when the accused is not a member of or associated with those forces.*" (Italics supplied)

and again at page 43 the Court said:

> "The exception from the Amendments of 'cases arising in the land or naval forces' was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. *Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces* for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts." (Italics supplied)

Court martial jurisdiction cannot be exercised after discharge in connection with an alleged offense committed

against military law unless it has attached before separation from such service. Mosher v. Hunter (1944), 143 Fed. Rep. 2d 745.

Article 3(a) of the Uniform Code of Military Justice, admittedly is an attempt to extend jurisdiction to the military forces over a civilian whose military status has terminated, as it only applies in such instances.

The Congressional authority to adopt Art. 3(a) must rest upon some expressed or implied power extended under the Constitution. Article I, Section 8, Clause 12, providing authority "to raise and support armies" is not applicable, as Art. 3(a) does not provide that the accused shall be returned to a military status, even for the purpose of trial; nor does it rest upon the power of Congress to govern and regulate the land forces, (Article 1, Section 8, Clause 14) as the accused has been discharged from his military service and has returned to civilian life. Therefore, he could not be subject to such regulation; nor do we believe he is subject to the exception in the Fifth Amendment heretofore discussed. Flannery v. Commanding General Second Service Command, 69 Federal Supplement 661 (1946).

In the case of In Re Bogart, 3 Federal Cases 796; and several later cases, the court construed the word "cases", as used in the Fifth Amendment, as being synonymous with "events", which theory was followed by the Circuit Court of Appeals in the instant case. This interpretation is a violation of the fundamental canon for construction of Constitutional Provisions to the effect "that the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen". 11 Amer. Juris. 670, Sec. 59, Ex Parte In the Matter of Edward Lange, Petitioner, 18 Wall. 163, Ex Rel. Flannery v. Commanding General, supra.

The attempt on the part of Congress to subject civilians to military jurisdiction, under Article 3(a) of the Military Code, is an encroachment upon their civil rights. As stated by the District Court in this case—

> "This subject is a very serious one, as the Court sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. 'It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done.'" Toth v. Talbott, 133 Fed. Supp. 330.

There is a further important legal objection to Article 3(a) of the Uniform Code. It is apparent that Congress under this Article intended to cover those crimes punishable by confinement of five years or more, but in reality even petty offenses are now included. Punishment is determined by the Table of Maximum Punishments as set out at Page 219 of the Manual for Courts Martial, United States 1951. In time of war, however, the Table is automatically suspended as to certain offenses (pages 217, Par. 127c, Manual for Courts Martial supra).

Furthermore, the Table was suspended in the Far East Command (under which the accused served) by the President of the United States under date of May 29, 1951, by Executive Order 10247, with reference to punishments for violations of Articles 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113, and 115 of the Uniform Code of Military Justice. (See Appendix I).

As a result, minor offenses such as One Day Absence Without Leave, Article 86(3) of the Code, for which the usual punishment under the Table of Maximum Punish-

ments was three days at hard labor, is now "punishable" by confinement of five years or more, and honorably discharged offenders would be subject to the provisions of Article 3(a) of the Code.

Likewise, a violation of Article 87 of the Code (Missing Movement), which carried a relatively light punishment under the Table, is now also "punishable" by confinement of five years or more.

To subject discharged persons to arrest and removal to a foreign country for petty offenses is so lacking in due process as to constitute deprivation of constitutional guaranties.

The questions raised by the petition are of grave concern, not only to the American Legion, but also to the many discharged veterans who served their country in time of need, as the issue is the superiority of the civil power over the military power.

CONCLUSION

For the reasons hereinabove stated, we submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia should be granted.

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APPENDIX I

EXECUTIVE ORDER 10247 (3 CFR—1951 SUPPLEMENT)

Suspending the limitations upon punishments for violations of Articles 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115, of the Uniform Code of Military Justice.

By virtue of the authority vested in me by Article 56 of the Uniform Code of Military Justice (established by the Act of May 5th, 1950, 65 Stat. 107) and as President of the United States, I hereby suspend, until further order, as to offenses committed on and after May 31st, 1951, by persons under the command of, or within any area controlled by the Commander in Chief, Far East, or any of his successors in Command, the limitations prescribed by the Table of Maximum Punishments, Par. 127c of the Manual for Courts Martial, United States, 1951 (prescribed by Executive Order No. 10214 of February 8th, 1951); upon punishments for violations of Acts 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115 of the Uniform Code of Military Justice.

HARRY S. TRUMAN

THE WHITE HOUSE
MAY 29th, 1951

BRIEF FOR THE AMERICAN LEGION, AMICUS CURIAE

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

PRELIMINARY STATEMENT

This Brief is filed by The American Legion, *amicus curiae,* pursuant to Rule 42(2), Revised Rules of the Supreme Court adopted April 12, 1954 and effective July 1, 1954.

The American Legion is composed of veterans of both World Wars and those who served during the Korean hostilities. It is a non-political civilian organization originally chartered by Act of Congress on September 10, 1919 (U. S. C. A. Title 36, Sec. 41-51, inclusive). It has fifty-eight (58) Departments, forty-nine (49) of which are located within the continental limits of the United States, which, in turn, are organized into Posts; at the present time there are 17,172 Posts with a total membership of 2,791,762.

Since the inception of the Legion, the first precept in the Preamble to its Constitution has been "to uphold and defend the Constitution of the United States of America." Furthermore, in 1942, Congress amended the Legion's Charter to include this purpose. (36 U. S. C. A. Sec. 43, 56 Stat. 1012) Consequently, the Legion has a deep interest in the protection of the constitutional rights of all veterans.

In this Brief the Legion will support the petitioner and will set forth the reasons why it believes the decision of the court below should be reversed.

The record in this case presents a number of questions which call for an interpretation of the validity and application of certain Articles of the Uniform Code of Military Justice which involve the constitutional rights of Robert W. Toth, who had received an honorable discharge from the United States Air Service, returning him to a civilian status, but who thereafter was charged with a serious offense under Article 3(a) of said Code.

No doubt the parties to this action, in their respective Briefs, have supplied or will supply the opinions below, the jurisdiction of the court, the questions presented, the statement of the case and its disposition, and we shall avoid repeating them herein. However, we will set forth the

constitutional provisions and statutes which we consider pertinent to the determination of this cause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are involved in this action:

> Article 1, Section 8. The Congress shall have power:
>
> Clause 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . .
>
> Clause 14. To make rules for the government and regulation of the land and naval forces.
>
> Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes

Article 2, the Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A., 552 (See Appendix I).

Article 3(a), the Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A., Section 553(a) provides:

> Article 3(a): Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five

> years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Article 7(b), the Uniform Code of Military Justice, 64 Stat. 111, 50 U. S. C. A., Section 561(b) provides:

> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

ARGUMENT

I

Article 2 of the Uniform Code of Military Justice enumerates, by class, those persons who are subject thereto. This section includes those persons belonging to a regular component of the Armed Forces while in that status. Article 3(a) of the Code recognizes that such persons were only subject to the Code while in that status, but attempts to make them amenable to trial as civilians, which makes it inoperative. Article 7(b) of the Code would also be inoperative for the same reason.

Robert W. Toth received an honorable discharge from the United States Air Force on December 8, 1952. (R. 1 & 2) Before his discharge he had served in Korea. Later, on April 8, 1953, court martial charges under oath were filed against him, under which he was accused of the murder in Korea of a Korean National and with conspiracy to commit murder against said Korean National. It was further charged that said alleged offenses were committed on or about September 27, 1952. (R. 15) On May 13, 1953, which was several months after his honorable discharge, he was arrested by the military forces and transported to Korea in connection with these charges. (R. 20)

Article 2, Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A. Sec. 552, specifically sets out the persons who are subject to the Code. Subsection 1 of this Article includes "all persons belonging to a regular component of the Armed Forces, including those awaiting discharge after expiration of the terms of enlistment."

We can only conclude from this language that members of the Armed Forces were only subject to the Code during

their respective periods of service. This is recognized by the language used in Article 3(a) of the Code, 64 Stat. 109, 50 U. S. C. A. Sec. 553(a), which attempts to make a person amenable to trial by court martial for an offense allegedly committed *"while in a status in which he was subject to this Chapter."* (Our emphasis)

The Chapter covering the Uniform Code of Military Justice not only provides procedure, but also lists the offenses, the commission of which may subject the offender to trial by court martial. Consequently, Article 2 of the Code, by enumerating the persons subject to the Chapter (Code) had reference to all of the provisions of the Chapter, including offenses and the trial thereof. After his discharge to civilian life, Toth was no longer "in a status in which he was subject to this Chapter." This being true, Article 3(a) would of necessity be inoperative, as it attempts to make a person amenable to trial by court martial after his status has changed from that of a member of the Armed Forces to that of a civilian, although under Article 2 he is not made subject to such trial as a civilian.

Article 7(b), authorizing apprehension, 64 Stat. 111, 50 U. S. C. A. Sec. 561(b) would also be inoperative in the instant case, as Toth was returned to the status of a civilian by his honorable discharge, and there is no attempt under any provision of the Code to return a civilian to the military service for apprehension and trial.

Inasmuch as the charges against Toth are criminal in nature and involve his life and liberty, the provisions of the Act applicable to such charges must be strictly construed.

Aside from the constitutional questions involved in this case, which will later be discussed, we submit that Article

3(a) can have no application to a civilian. Military jurisdiction in this case would be violative of the traditions of our government since its inception. In a concurring opinion in the case of *Duncan v. Kahanamoku*, 327 U. S. 304, 90 L. Ed. 688, 66 Sup. Ct. 606, it was stated:

> "Abhorrence of military rule is ingrained in our form of government. Those who founded this nation knew full well that the arbitrary power of conviction and punishment for pretended offenses is the hallmark of despotism. See The Federalist, No. 83. History had demonstrated that fact to them time and again. They shed their blood to win independence from a ruler who they alleged was attempting to render the 'military independent of and superior to the civil power' and who was 'depriving us of the benefits of trial by jury.' In the earliest state constitutions they inserted definite provisions placing the military under 'strict subordination' to the civil power at all times and in all cases. And in framing the Bill of Rights of the Federal Constitution they were careful to make sure that the power to punish would rest primarily with the civil authorities at all times. They believed that a trial by an established court, with an impartial jury, was the only certain way to protect an individual against oppression. The Bill of Rights translated that belief into reality by guaranteeing the observance of jury trials and other basic procedural rights foreign to military proceedings. This supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations."

The Legion views with great concern the attempt of Congress under Article 3(a) to go beyond and disregard the finality of an honorable discharge for the purpose of

making a private citizen amenable to trial by court martial as a civilian. Since the adoption of the Uniform Code of Military Justice, approximately two million men have been inducted into the military service, many have been discharged honorably, and if the Universal Military Training and Service Act which was adopted June 19, 1951 (C. 144, Tit. 1, Sec. 1(a), 65 Stat. —, 50 Appendix U.S.C.A. Sec. 451 et seq.) continues in effect, many others will serve honorably and be separated honorably from such service.

If these men can be recalled for trial by Court Martial by the military under an Act of Congress, after return to civilian life, then an honorable discharge is of little value, and the Bill of Rights has become ineffective for the protection of human rights.

II

Congress acted without Constitutional authority in adopting Article 3(a). Consequently, the United States Air Force has no jurisdiction over the accused.

The fundamental question involved in this case is whether the United States Air Force has jurisdiction over Toth under Article 3(a). This requires an inquiry into the constitutional authority of Congress to adopt this Article.

Congress has the power under Article 1, Section 8, Clause 12, of the Constitution, "to raise and support armies". This could not possibly be applicable to the instant case, as Article 3(a) makes no provision for the return of the accused to the military service, even for the purpose of the trial. Under the provisions of the article, the accused could only be tried as a civilian. Consequently, the Congressional authority to raise armies is not involved. Nor is the Congressional authority to govern and regulate the land forces (Article 1, Section 8, Clause 14) a factor, as the accused has

been discharged from his military service and has returned to civilian life. We find no provision in the Code for the recall of any person who might be subject to Article 3(a). Flannery v. Commanding General, Second Service Command, et al. (1946), 69 Fed. Supp. 661.

It has been insisted by counsel for the respondent that the portion of the Fifth Amendment "except in cases arising in the land or naval forces" affords constitutional authority for the adoption by Congress of Article 3(a) of the Code. This contention is predicated on the case of In Re: Bogart, 3 Fed Cases, 796 (1873), which was followed without consideration in Ex Parte Joly, D. C., 290 Fed. 858 (D.C.S.D. N.Y. 1922) and Terry v. U. S., 2 Fed. Supp. 962 (D.C.W.D. Wash. 1933).

The Bogart case construed the word "cases" as used in the Fifth Amendment, as being synonymous with "events". This theory was adopted by the Circuit Court of Appeals in the instant case. In the Bogart case the court adopted the dictionary definition. We submit that the word "cases", as used in this Amendment, should be construed as synonymous with "prosecutions" and not "events", as it certainly refers to disciplinary proceedings which arise in the land and naval forces.

Chief Justice Marshall, in Marbury v. Madison, 1 Cranch 137, defined a case as a suit instituted pursuant to the regular course of judicial procedure. In the later case of Osborne et al. v. The Bank of the United States, 9 Wheat. 738 (page 819), in declaring the judicial power of the United States under the first Section, Third Article of the Constitution, he again construed the word "cases" as follows:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any

> question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

In the following cases, a similar construction was given this word:

> **U. S. v. Rosenthal, 121 Fed. 862, 866 (C.C.S.D. N.Y. 1903);**
> **U. S. ex rel. Flannery v. Commanding General, supra;**
> **In Re Pacific Railway Commission, C.C.Cal., 32 F. 241, 255;**
> Cooke v. State of Ind., 7 Blackf. 165;
> Calderwood v. Peyser, 42 Cal. 110, 115;
> Comstock Mill v. Allen, 21 Nev. 325, 31 Pacific 434.

In his Treatise on Military Law and Precedents, Gov't Printing Office (2d Ed. 1920) at pages 106, 107, Col. William Winthrop, a recognized authority on military law, expressed grave doubt as to the constitutionality of legislation which authorized court martial jurisdiction over civilians.

At the Congressional Committee Hearings prior to the passage of the Code, doubt was also expressed by various witnesses relative to the constitutionality of Article 3(a).

The then Judge Advocate General of the Army, in speaking with reference to Article 3(a), stated:

> "I believe this is unnecessary, and the inevitable result will be public revulsion against its exercise." (Sen. Rep. No. 486, page 256, 81st Cong., 1st Sess. (1949)).

Mr. Felix Larkin, Assistant General Counsel of the Office of the Secretary of Defense, who was Executive Secretary of the Committee on the Uniform Code of Military Justice, also stated his views on Article 3(a) as follows:

> "There is one concern that I would have * * * and I do not know the answer, frankly * * * which has to do with the third type if you will, and that is the person who serves, is discharged and who neither joins the reserves or does not re-enlist and becomes for all purposes a civilian.
>
> "The question I have in connection with it—actually I think if it were possible you ought to be consistent across the boards in those types of cases—is the constitutionality of attempting to retain a continuing jurisdiction over that person since now he clearly is not in the land or naval forces, even though while he was in them he did commit an offense which would have made him subject to its jurisdiction if tried at that time. * * * I think there is a difficult legal problem in that one type at least." (H. R. Rep. No. 491, page 883)

Article 3(a) of the Uniform Code, by its own terms, is an attempt to extend jurisdiction to the military forces over a civilian whose military status has terminated, as it only applies in such instances. In the case of Mosher v. Hunter (1944), 143 Fed. Rep. 2d 745 the court held that court martial jurisdiction cannot be exercised after discharge in connection with an alleged offense committed against military law unless it has attached before separation from such service.

In Ex Parte Richard Quirin (1942), 317 U. S. 1, at page 41, this Court stated:

> "We may assume, without deciding, that a trial prosecuted before a military commission created by military

> authority is not one 'arising in the land * * * forces,' *when the accused is not a member of or associated with those forces.*" (Italics supplied)

and again at page 43 the Court said:

> "The exception from the Amendments of 'cases arising in the land or naval forces' was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. *Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces* for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts." (Italics supplied)

The court below, in construing the word "cases" as used in the Fifth Amendment, violated one of the fundamental canons for the construction of constitutional provisions to the effect: "that the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen". (11 Amer. Juris. 670, Sec. 59 Ex Parte In the Matter of Edward Lange, Petitioner, 18 Wall. 163, Ex Rel. Flannery v. Commanding General, supra.)

III

Executive Order 10247, suspending the limitations prescribed by the Table of Maximum Punishments, U. S. Manual for Court Martial, destroyed the due process guaranty under the Fifth Amendment.

Article 3(a) of the Uniform Code was intended to cover those major crimes punishable by confinement of five years or more, but in reality, petty offenses are now included. The Table of Maximum Punishments, as set out at page 19 of the Manual for Court Martial, U. S. 1951, determines

the punishment for each offense under the Code. This Table is automatically suspended as to certain offenses in time of war. (P. 217, Par. 127c, Manual for Court Martial, supra.) The President of the United States, under date of May 29, 1951, by Executive Order 10247 (See Appendix II), suspended the Table of Maximum Punishments in the Far East Command with reference to punishments for violations of Articles 82, 85, 86(3), 87, 90, 91(1) and (2), 113 and 115 of the Uniform Code of Military Justice. By this action, minor offenses such as a one-day absence without leave (Article 86(3) of the Code), for which the usual punishment under the Table of Maximum Punishments was three days at hard labor, is now "punishable" by confinement of five years or more, and honorably discharged offenders would be subject to the provisions of Article 3(a) of the Code. A violation of Article 87 of the Code (Missing Movement) which carried a relatively light punishment under the Table, is now "punishable" by confinement of five years or more, under Article 3(a) of the Code.

To make such offenses punishable under Article 3(a), changes the original purpose of Congress, and by the inclusion of relatively minor offenses, 3(a), is so lacking in due process as to constitute deprivation of constitutional guaranties under the Fifth Amendment. The questions which are presented in this case are of grave concern to all veterans who were inducted and discharged after the adoption of the Uniform Military Code, as the issue involved is the superiority of the civil power over the military power.

CONCLUSION

For the reasons herein stated, we submit that the decision of the court below should be reversed and that the

petitioner should be granted such other and further relief to which he may be entitled.

Respectfully submitted,

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APPENDIX I

ARTICLE 2. UNIFORM CODE OF MILITARY JUSTICE

(65 STAT. 109, 50 U. S. C. A. SEC. 552)

The following persons are subject to this chapter:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers from the time of their muster or acceptance into the armed forces of the United States; all inductees from the time of their actual induction into the armed forces of the United States, and all other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call or order to obey the same;

(2) Cadets, aviation cadets, and midshipmen;

(3) Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code;

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospitalization from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and without the following Territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

APPENDIX II

EXECUTIVE ORDER 10247 (3 CFR—1951 SUPPLEMENT)

Suspending the limitations upon punishments for violations of Articles 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115, of the Uniform Code of Military Justice.

By virtue of the authority vested in me by Article 56 of the Uniform Code of Military Justice (established by the Act of May 5th, 1950, 65 Stat. 107) and as President of the United States, I hereby suspend, until further order, as to offenses committed on and after May 31st, 1951, by persons under the command of, or within any area controlled by the Commander in Chief, Far East, or any of his successors in Command, the limitations prescribed by the Table of Maximum Punishments, Par. 127c of the Manual for Courts Martial, United States, 1951 (prescribed by Executive Order No. 10214 of February 8th, 1951), upon punishments for violations of Acts 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115 of the Uniform Code of Military Justice.

HARRY S. TRUMAN

THE WHITE HOUSE
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In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 150

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 37-53) has not yet been reported. The opinions of the district court (R. 21-23 and 30-33) are reported at 113 F. Supp. 330 and 114 F. Supp. 468.

JURISDICTION

The judgment of the court of appeals was entered March 25, 1954 (R. 54). The petition for a writ of

certiorari was filed June 18, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether Article 3(a) of the Uniform Code of Military Justice, providing that a person discharged from the armed services may, after discharge, be tried by court-martial for an offense committed while in service which is punishable by confinement of five years (or more) and is not triable by a court of the United States, is constitutional.

2. Whether Congress has empowered and constitutionally may empower the military authorities to apprehend a discharged serviceman accused of such offense for the purpose of bringing him to trial by court-martial.

3. Whether a person so apprehended may be removed from this country to the place of trial.

STATUTES AND REGULATIONS INVOLVED

The Uniform Code of Military Justice, 64 Stat. 107-145 (50 U. S. C. 551-736) provides in pertinent part:

Article 3(a) (50 U. S. C. 553(a)):

> **Jurisdiction to try certain personnel.**
>
> Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory

thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Article 5 (50 U. S. C. 555):

Territorial applicability of the code.

This code shall be applicable in all places.

Article 7 (50 U. S. C. 561):

Apprehension.

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

The Manual for Courts-Martial, United States, 1951 (promulgated under Executive Order No. 10214, dated February 8, 1951, 16 FR 1303-1469) provides in pertinent part:

Paragraph 11. **Termination of Jurisdiction.**—a. **General rule.**—The general rule is that court-martial jurisdiction over officers, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-

entry into the military service or return into such status.

b. **Exceptions.**—To this general rule there are, however, some exceptions which include the following:

Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in a status in which he was subject to the code and for which he cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia is not terminated by discharge or other termination of such status (Art. 3a). Jurisdiction under Article 3a should not be exercised without the consent of the Secretary of the Department concerned.

STATEMENT

Robert W. Toth was honorably discharged from the United States Air Force on December 8, 1952, after service in Korea (R. 1-2, 8). On April 8, 1953, after investigation, court-martial charges were preferred against him alleging that, on or about September 27, 1952, while in service in Korea, he had entered into a conspiracy to commit murder and had murdered a Korean national in violation of Articles 81 and 118 of the Uniform Code of Military Justice, 50 U.S.C. 675 and 712 (R. 8, 9, 14-18). On April 30, 1953, the Acting Secretary of the Air Force authorized Toth's apprehension, return to Korea and trial by court-martial on these charges

(R. 8-9, 19-20).[1] On May 13, 1953, Toth was apprehended by military personnel in Pittsburgh, and he subsequently was flown to Korea to stand trial (R. 9).[2]

On May 27, 1953, Toth's sister filed in the District Court for the District of Columbia a writ of habeas corpus, directed to the Secretary of the Air Force, seeking Toth's release from the custody of the Air Force on the ground that his apprehension and removal to Korea were in violation of the Constitution and the Rules of Criminal Procedure (R. 1-6). The district court issued an order to show cause (R. 7); respondent filed a return (R. 7-20); and the district court, after hearing argument, ordered that the writ issue (R. 21-23).[3] After Toth was produced in court, the district court ordered his discharge from military custody, on the ground that

[1] Paragraph 11b of the Manual for Courts-Martial, 1951, 16 F.R. 1308, provides that jurisdiction under Article 3(a) of the Code, *supra*, for offenses committed while in service triable by court-martial, after discharge, "should not be exercised without the consent of the Secretary of the Department concerned."

[2] The complete record before the district court, which is on file with the Clerk of this Court, contains affidavits by military personnel to the effect that Toth was informed of the investigation on March 11, before charges were preferred (Tr. 127-131); that the charges were read to him at the time he was apprehended and again at the Provost Marshal's office in Pittsburgh (Tr. 142-148); that he was informed that he could call his family and telephone a civilian lawyer, if he so desired, and was later similarly advised at Andrews Air Force Base, Maryland (Tr. 143, 155-157); that later a civilian attorney, retained by Toth's family, flew to Korea with the assistance of the Air Force (Tr. 167).

[3] An appeal from that order was dismissed on the ground that the order was not final (R. 27-28).

no provision was made in the Code of Military Justice for the removal of a civilian for trial by court-martial to a point distant from the place of apprehension (R. 30-33).

On appeal, the judgment of the district court was reversed (R. 54). The court of appeals held that both the language and legislative history of Article 3(a) reveal the Congressional purpose to make persons discharged from service amenable to trial by court-martial for serious crimes committed while in service which could not be tried by a court of the United States; that there is "no constitutional infirmity in amenability to trial at the place of the offense and under the law applicable to the offense at the time of its commission" (R. 39-40); and that "the statute which makes a civilian amenable to trial by court-martial necessarily connotes authority to apprehend him for that purpose and to remove him for trial to the place where the alleged offense was committed" (R. 51).

ARGUMENT

For more than eighty years, Congress has exercised, and the federal courts have sustained, the power to provide for trial by court-martial of persons who commit crimes while in the military service but are not apprehended or tried until after their separation from the service. In Article 3(a) of the Uniform Code of Military Justice, this power has been exercised with obvious restraint and propriety, being limited to offenses which are (1) serious in character and (2) not triable by any

American court if they are not triable by court-martial. There is, we submit, no merit in petitioner's claim that the Article is unconstitutional. And it is equally clear that petitioner misreads the Code in the independent arguments that though Congress provided for trial by court-martial in cases like this, it left the provision pointless by failing to confer authority for apprehension of the defendant and failed to permit the defendant's removal for trial to the place of the crime, a procedure which is permitted in all other court-martial cases.

1. The petition for a writ of certiorari speaks generally in terms of the authority of the military to try a civilian, but no such issue is really involved. We are not concerned with a person who has never been subject to military discipline. The alleged crime here involved is one committed by a person in the armed forces while he was subject to military discipline, a crime which cannot be tried by any civilian court in the United States. The real question, therefore, is whether Congress may constitutionally provide that a member of the armed forces who commits a serious crime while in service shall not automatically receive absolution by virtue of the fact that he happens to have been discharged before the crime or his responsibility therefor has been discovered.

As the court below points out (R. 41-43), that is not a novel question. Since 1863, Congress has provided for cases in which discharge from military

service would not operate as a bar to trial by court-martial for crimes committed while in service. Specifically, until enactment of the new Code, it had provided for trial by court-martial of discharged persons accused of committing fraud against the government while in service.[4] The constitutionality of such provisions has repeatedly been upheld. *In re Bogart*, 3 Fed. Cas. 796 (C. C. D. Cal.); *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.);[5] *Terry* v. *United States*, 2 F. Supp. 962 (W. D. Wash.); *United States ex rel. Marino* v. *Hildreth*, 61 F. Supp. 667 (E. D. N. Y.); *Kronberg* v. *Hale*, 180 Fed. 2d 128 (C.A. 9), certiorari denied,

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[4] Section 2 of the Act of March 2, 1863, 12 Stat. 696, 697, provided in pertinent part that:

> * * * any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Substantially similar provisions appear as Article of War 60, Rev. Stat. 1342 (1878); Article of War 94 (1920), 41 Stat. 805, 10 U.S.C. (1946 ed.) 1566; Article of War 94 (1948), 62 Stat. 640, 10 U.S.C. (Supp. IV) 1566.

[5] The constitutional doubts expressed by Colonel Winthrop, to which petitioner refers (Pet. 9-10), were noted by the court in *Ex parte Joly*, *supra*, 290 Fed. at 860, the court stating that Colonel Winthrop "realized that such authority as there was held otherwise." See, also, Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 83-84, concluding that the matter of continuing court-martial jurisdiction presents no constitutional difficulty.

339 U. S. 969; see also the references to the 1863 statute in the decision of this Court in *Hirshberg* v. *Cooke*, 336 U. S. 210, 214. The basic rationale of the decisions is that such continuing jurisdiction is consistent with the Fifth Amendment, which excepts from the requirement of indictment "cases arising in the land or naval forces," since the case arises when the crime is committed, *i.e.* while the accused is in the military service.

Article 3(a) of the present Uniform Code merely extends the principles of the earlier statute to all serious crimes punishable by imprisonment for five years or more. The legislative history shows that Congress wished to avoid, for the future, results such as those in *Hirshberg* v. *Cooke*, 336 U. S. 210, and *In re Lo Dolce*, 106 F. Supp. 455 (W. D. N. Y.), where men accused of major crimes committed during military service were discharged and were thereafter immune from punishment either by civil or military courts. Congress thought it undesirable "that some persons can escape trial by court martial by the mere lawful termination of service", and yet wished to place "sufficient limitations on the continuing jurisdiction to prevent capricious actions on the part of military authorities." S. Rep. No. 486, 81st Cong., 1st sess., p. 8; H. Rep. No. 491, 81st Cong., 1st sess., p. 5. Hence, it limited the continuing jurisdiction to serious offenses that could not otherwise be tried by American civil courts.

2. Conceding the purpose of Congress in Article

3(a) of the Uniform Code to permit trial by court-martial of discharged servicemen like the accused in this case (though questioning the *power* of Congress to do so), petitioner nevertheless argues (Pet. 10-12) that Congress failed to provide authority for the apprehension of such persons for trial. In this argument, petitioner misreads Article 9 of the Uniform Code and ignores the clear power of apprehension conferred by Article 7.

Article 7 of the Code, 50 U. S. C. 561, provides:

> (a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code *or to trial thereunder* may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. [Emphasis added.]

The authority to "arrest" persons amenable to trial by court-martial under Article 3(a) is thus part of the general authority to "apprehend" conferred by Article 7.

This provision for apprehension by military authorities of discharged servicemen subject to trial by court-martial is in keeping with a long-established historical pattern. The original fraud statute of 1863, from which Article 3 basically stems, provided that discharged persons amenable to trial by court-martial were to be "arrested and held for trial and sentence by a court-martial, in the same

manner and to the same extent" as if not discharged. Thus, historically, Congress had provided that the continuing jurisdiction of the military over discharged persons accused of certain crimes should be exercised directly by military action to take the accused into custody for trial. The continuation of the same procedure was plainly authorized by the general provisions for apprehension in Article 7, quoted above, which cover this case.

Petitioner's claim of inconsistency between Article 3(a) and Article 9, 50 U. S. C. 563,[6] (Pet. 11-12) is based upon a misconception of the term "arrest" as used in the Code. The provisions of Article 9(c) do not deal with "arrest" as that term is used in civilian terminology. The Code term for the civilian concept of arrest is "apprehension." This was

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[6] Article 9 provides in pertinent part:

(a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

* * * * *

(c) An officer, a warrant officer, or a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

made clear at the House Hearings before the Subcommittee of the Committee on Armed Services on H. R. 2498, 81st Cong., 1st sess., p. 902, where, with reference to this matter, it was stated:

> Mr. Larkin. This is new in format, more than in anything else; Mr. Chairman. In our study of the Articles of War and the Articles for the Government of the Navy we found a certain duality of meaning in the words "arrest", "restraint", "confinement", and words of that character, and we adopted this scheme to clarify the definitions of those words and started off with "apprehension" in article 7.

Article 9 is, therefore, irrelevant to the question of the authority to take a discharged serviceman into military custody, *i.e.*, to "apprehend" him, for the purposes of court-martial under Article 3(a). That authority is the general authority to "apprehend" conferred by Article 7.

Petitioner's argument as to the danger of abuse of the power conferred on the military authorities by Article 3(a) as implemented by Article 7, has no foundation in reality. While the general power of apprehension conferred by Article 7, covering many situations beyond those presented by Article 3(a), seems on its face to be broad, no serious possibility of abuse exists when that power is considered, as it must be, in the light of the limitation set by Article 3(a) and the implementing regula-

tions. In the first place, under Article 3(a), jurisdiction over discharged servicemen is limited to serious offenses, punishable by imprisonment for five years or more, and then only to such offenses as cannot be tried in a civil court. Moreover, as noted above, the Manual for Courts-Martial, in implementing Article 3(a), provides that such jurisdiction should not be exercised without the consent of the Secretary of the Department concerned. Thus, before an attempt is made to assert jurisdiction over a discharged serviceman under Article 3(a), there are not only the ordinary preliminary safeguards of Article 30, 50 U. S. C. 601, requiring sworn charges by a person who "has personal knowledge of, or has investigated, the matters set forth therein", but also the additional safeguard of review by the Secretary of the Department concerned. The provision for such review insures that in every case, as in this one, a thorough preliminary investigation will necessarily precede the apprehension of a discharged serviceman for trial by court-martial under Article 3(a). In sum, ample precautionary measures are provided to make certain that a person will not lightly be taken from civilian life for trial by court-martial.

That Congress has entrusted to military authority the initial judgment as to the existence of probable cause to believe that a person has committed a crime subject to military jurisdiction does not establish a lack of due process. As the court said in

In re Bogart, supra, the first case to consider the question of continuing court-martial jurisdiction over discharged servicemen (3 Fed. Cases at 801):

> This court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositories of jurisdiction over military offenses, will abuse these powers, than that those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them.[7]

Moreover, as the court below points out (R. 48), "the federal courts were open to Toth upon petition for a writ of *habeas corpus* at every instant after his apprehension"—insuring his right to due process and safeguarding against action by the military authorities in excess of their jurisdiction (affording review, for example, of such questions as whether Toth was actually an ex-serviceman, whether the crime in question was comprehended

---

[7] That a hearing by a civilian court is not a constitutional prerequisite to the exercise of military jurisdiction is established by decisions upholding the validity of selective service regulations promulgated during World War I under authority of the Selective Service Act of May 18, 1917, 40 Stat. 76, to the effect that persons who failed to report for induction would be automatically inducted into the armed forces upon receipt of a notice of induction, and thereafter subject to court-martial jurisdiction. *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C.A. 2), certiorari denied, 310 U.S. 648; *United States* v. *McIntyre*, 4 F. 2d 823 (C.A. 9); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C.A. 2), certiorari denied, 262 U.S. 760; *Franke* v. *Murray*, 248 Fed. 865 (C.A. 8).

by Article 3(a), etc.).[8] Petitioner was in fact accorded such a hearing, and his rights were therefore protected by the judiciary.

3. The removal of a discharged serviceman so apprehended to the place of trial presents no constitutional or statutory problems. Once he is brought within the jurisdiction of the military for the purposes of trial, he may clearly be removed to the place of trial as would any person actually in the armed forces. There is no territorial limitation on courts-martial. Article 5 of the Uniform Code, 50 U.S.C. 555, provides that "This code shall be applicable in all places." The accused, like other persons subject to court-martial jurisdiction, has numerous rights conferred by the Code, *e.g.*, the right to preliminary investigation under Article 32, 50 U.S.C. 603, to preliminary review of the charges under Article 34, 50 U.S.C. 605, and the right to representation by counsel under Articles 32, *supra*, and 38, 50 U.S.C. 613. As the court below stated (R. 46):

> These provisions of the Uniform Code seem to afford an accused as great protections by way of preliminary inquiry into probable cause as do requirements for grand jury in-

[8] The Government conceded the district court's jurisdiction (R. 21). Toth could have sought habeas corpus when he was apprehended in the United States and during the period thereafter before his transfer to Korea. Cf. *Burns* v. *Wilson*, 346 U.S. 137, where petitioners were convicted by court-martial in Guam, within the jurisdiction of a federal district court, then transferred for the convenience of the Government to await execution in Japan.

quiry and indictment. * * * Thus the basic purpose of a hearing preliminary to trial is being met by a method designed pursuant to constitutional provisions, and the method meets all elements essential to due process in that feature of the proceedings.

CONCLUSION

The decision below is clearly correct and is in accord with precedents extending back over eighty years. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1954.

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No. 1003

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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or in any other place when the events giving rise to the case occur in that place. This case—where the offense was against military law and was committed while Toth was a member of the military forces subject to that law—arose in the military forces. Toth's discharge before the crime was prosecuted makes no difference. In holding for over ninety years that this is so, Congress and the lower courts have conformed to the plain meaning of the Fifth Amendment.

II

A. Clearly intending in Article 3(a) of the Uniform Code to reach cases just like this one, Congress did not legislate in what petitioner describes (Br. 42) as "a confounding or abortive manner" by failing to provide the procedures to implement this objective. The Code provides in express terms for apprehending and holding for trial persons like Toth. Article 7(b) governs the apprehension of both persons "subject to this code" and those "subject * * * to trial thereunder." The latter phrase squarely covers Toth. Similarly, Article 9(c) authorizes restraint of "a civilian subject to * * * trial" under the Code on order of "a commanding officer to whose authority he is subject." Referring explicitly to a civilian like Toth, the provision is not to be nullified by petitioner's suggestion that, because he was a civilian, there was no "commanding officer to whose authority he [was] subject." Naturally, the Code does not specify the commanding officer to whose authority Toth would be sub-

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ject any more than it describes the commanding officer of a deserter from a unit subsequently inactivated or the commander of an army in the field. This is a matter for appropriate orders and regulations. The Articles of the Code subject Toth to *military authority*, and there is no question that, beginning with the directive of the Secretary of the Air Force, Toth's restraint was effected by commanding officers to whose authority he had been duly made subject.

B. Toth's apprehension by military authorities and removal for trial to Korea, where the offense occurred, accords with due process. As this litigation demonstrates, the civil courts were open to him to test on habeas corpus the assertion of military jurisdiction, *Billings* v. *Truesdell*, 321 U.S. 542; *Burns* v. *Wilson*, 346 U.S. 137. Subject to this safeguard, there is no constitutional infirmity in the exercise of military jurisdiction by military authorities following the fair procedures prescribed by military law.

"The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge." *Hughes* v. *Gault*, 271 U.S. 142, 149 (Holmes, J.). And there is nothing strange to American tradition in providing, as Congress has since at least 1863 (cf. *Martin* v. *Mott*, 12 Wheat. 19, decided in 1827), that military officers may apprehend and bring before military courts persons subject to trial in such courts. This action was taken against Toth only

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 150

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 37-50) is reported at 215 F. 2d 22. The opinions of the District Court (R. 21-23 and 30-33) are reported at 113 F. Supp. 330 and 114 F. Supp. 468.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1954 (R. 51). The petition for

a writ of certiorari was filed on June 18, 1954, and was granted on October 14, 1954 (R. 94). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress has empowered the military authorities to apprehend and try by court-martial a person discharged from the armed forces who is subject to trial under Article 3(a) of the Uniform Code of Military Justice for an offense committed while in the armed forces which is punishable by confinement of five years (or more) and is not triable by a civil court of the United States.

2. Whether Article 3(a) of the Uniform Code, providing for trial by court-martial of such offenders, is constitutional.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, set forth in the Appendix, *infra*, pp. 59-67, are as follows: Uniform Code of Military Justice, 64 Stat. 107-145 (50 U.S.C. 551-736), Articles 3, 5, 7, 9, 32, and 34; and Manual for Courts-Martial, United States, 1951 (16 F.R. 1303-1469), paragraphs 11, 19; and Federal Rules of Criminal Procedure, Rule 40.

STATEMENT

Robert W. Toth was honorably discharged from the United States Air Force on December 8, 1952, after service in Korea (R. 1-2, 8).

On April 8, 1953, an officer of the United States Air Force, Far East Air Logistic Force, an overseas command, signed court-martial charges under

oath charging Toth with the premeditated murder in Korea of a Korean national on or about September 27, 1952, and with conspiracy to commit murder in Korea on or about September 27, 1952, all in violation of the Uniform Code of Military Justice (R. 8, 15-18).

On April 30, 1953, the Acting Secretary of the Air Force, upon consideration of the report of investigation theretofore conducted and the sworn court-martial charges, consented to the apprehension, return to Korea, and trial by court-martial of Toth, and directed the Air Provost Marshal, Air Force, to effect the apprehension of Toth and cause him to be delivered forthwith to the Commanding General, Fifth Air Force, an overseas command of the Air Force (R. 19-20).[1] On May 13, 1953, at Pittsburgh, Pennsylvania, Toth was apprehended by military personnel of the Air Force and subsequently transferred to Korea (R. 63, 66, 69, 74).

On May 27, 1953, Toth's sister, the petitioner here, filed in the District Court for the District of Columbia a petition for a writ of habeas corpus, directed to the Secretary of the Air Force, seeking Toth's release from the custody of the Air Force on the ground that his apprehension and removal to Korea were in violation of the Constitution and

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[1] Paragraph 11b of the Manual for Courts-Martial, 1951, 16 F.R. 1308, provides that jurisdiction under Article 3(a) of the Code, for offenses committed while in service triable by court-martial after discharge, "should not be exercised without the consent of the Secretary of the Department concerned." Appendix, *infra*, pp. 62-63.

the Rules of Criminal Procedure (R. 1-6). The District Court issued an order to show cause (R. 7). Respondent filed a return (R. 7-20) and several affidavits as to the circumstances leading to the charges and the manner of Toth's apprehension (R. 54-74, 78-83).

The affidavits show that, on March 11, 1953, prior to the preferment of charges, Toth voluntarily accompanied an agent of the Office of Special Investigations of the United States Air Force to the agent's Pittsburgh Detachment Office (R. 54-55, 57). The agent read and explained to Toth his right under Article 31(b) of the Uniform Code of Military Justice (50 U.S.C. 602) not to make any statement concerning the offenses being investigated, and advised him that any statement made by him could be used as evidence against him in a trial by court-martial. Toth was also informed of the nature of the matter being investigated. Toth stated that he had knowledge of the matter under investigation but refused to answer any other questions on grounds of self-incrimination. He further stated that the incident had occurred while he was in the military service and that, since he was a civilian, he did not wish to revive it.

At the time of arrest the officer in charge of the apprehending party read to Toth the charges, the specifications, and the Acting Secretary's letter consenting to his apprehension, and advised him again of his rights under Article 31(b) of the Uniform Code (R. 80). Toth was then taken to the Air Provost Marshal's Office at the Greater Pittsburgh

Airport, where again the charges, specifications and the Acting Secretary's letter were read to him, and he was again advised of his rights under Article 31(b) (R. 81). Toth was informed that he could telephone his parents and call a civilian lawyer if he so desired before leaving Pittsburgh. (R. 64, 70.) He stated that he did not desire to contact a lawyer but would wait and have defense counsel appointed for him in Korea (R. 70). In a telephone conversation with his stepfather he stated that he did not want the press to have any knowledge of what happened (R. 81, 82). On the same day, May 13, 1953, Toth was flown from Pittsburgh to Andrews Air Force Base, Maryland (R. 64, 81). There he was informed that he could contact the staff judge advocate or the chaplain, or both, if he so desired (R. 82). He was given permission to write letters (R. 65, 67, 70, 71, 73, 82). On May 15, 1953, he was flown to Travis Air Force Base, California, and from there to Korea, where he arrived on May 18, 1953 (R. 72-74).

A civilian attorney of Pittsburgh was retained by Toth's family to represent him. The Air Force facilitated the departure of this civilian attorney for Tokyo and made possible his transportation from Tokyo to Korea. Two qualified military counsel were assigned to represent Toth during the pretrial investigation under Article 32 of the Uniform Code. His civilian attorney was advised that, in the event Toth desired military counsel other than those theretofore appointed, Toth could make request therefor as provided in the 1951 Manual for

Courts-Martial. Toth's civilian attorney was also advised that, in the event he represented Toth in the trial, the appointed defense counsel and assistant defense counsel would be available to act as associate counsel if Toth so desired. (R. 38, 93.)

After hearing argument, the District Court ordered that the writ issue (R. 21-23). An appeal from that order was dismissed on the ground that the order was not final (R. 27-28). After Toth was produced in court, the District Court ordered his discharge from military custody, on the ground that no provision was made in the Uniform Code for the removal of a civilian for trial by court-martial to a point distant from the place of apprehension (R. 30-33).

On appeal, the judgment of the District Court was reversed (R. 50, 51). The Court of Appeals held that both the language and legislative history of Article 3(a) of the Uniform Code reveal the Congressional purpose to make persons discharged from military service amenable to trial by court-martial for serious crimes committed while in service which could not be tried by a court of the United States; that there is "no constitutional infirmity in amenability to trial at the place of the offense and under the law applicable to the offense at the time of its commission" (R. 39-40); and that in effect the statute "is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed" (R. 40).

SUMMARY OF ARGUMENT

Basic to petitioner's argument is the assertion that Toth was "at all times pertinent to the inquiry herein * * * a civilian" (Br. 14) "not connected in any way with the military forces" (Br. 17). Basic to our answer is the point that these characterizations misstate what is "pertinent" about both the terms of Article 3(a) and the facts of this case. It is central to the inquiry here that Toth is charged with murder at an Air Force base in Korea, committed while he was an airman wholly governed by military law and answerable to no civil tribunal of this or any other country for such an offense. These are the facts to which Article 3(a) applies and on which the constitutionality of Congress' provision for such cases must be judged. So judged, we submit, the statute is clearly valid. And Congress has not failed to provide procedures, which afford due process, to implement the military jurisdiction thus conferred.

I

A. For over ninety years Congress has exercised the power to provide for trial by court-martial of discharged servicemen for certain offenses committed while in military service. The statute so providing, first enacted in 1863, reenacted several times, and continuously in force until the Uniform Code became effective in 1951, covered generally crimes involving fraud against the United States. Unlike Article 3(a), which is questioned here, it

was not confined to cases outside the jurisdiction of the civil courts.

That long-standing enactment of 1863 has been repeatedly sustained by the lower federal courts, beginning with *In re Bogart*, 3 Fed. Cas. 796 (C. C. D. Cal.), written by Judge Sawyer in 1873. In *Hirshberg* v. *Cooke*, 336 U.S. 210, holding that a crime not involving fraud could not be tried by court-martial after expiration of the defendant sailor's enlistment, this Court pointed out that no such military jurisdiction could exist without statutory authorization and referred to the 1863 statute with no suggestion of doubt as to its constitutionality. In Article 3(a) Congress undertook to fill what, as far as *Hirshberg* revealed, was a statutory and not a constitutional gap. Nevertheless, we recognize of course that *Hirshberg* leaves open in this Court the constitutional issues petitioner raises, and we undertake to demonstrate that Congress and the lower courts have not acted contrary to the Constitution in the years since 1863.

B. Article 3(a) is a valid exercise of the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, sec. 8, cl. 14. As this Court has paraphrased its plain language, this clause authorizes Congress to provide for "the punishment of offenses committed by persons in the military service" (*Coleman* v. *Tennessee*, 97 U.S. 509, 514), to "define what shall constitute military offences, and prescribe their punishment" (*Tarble's Case*, 13 Wall. 397, 408). And Article 3(a) does precisely

this. Toth's offense was "committed * * * in the military service," and Congress has duly exercised the power to prescribe its punishment. This power has long been recognized as broad enough to reach civilians attached to or accompanying the armed forces; it has never been confined, as petitioner would confine it, to "only those persons who are actually in service" (Pet. Br. 35). It is surely broad enough to cover those in uniform, subject only to military law and triable by no civil court, whose offenses happen not to be discovered or prosecuted before their separation from service.

England, Canada, Australia, and New Zealand, with a common heritage of civilian supremacy and commonly derived military law, have enacted provisions like Article 3(a). Their action helps to demonstrate the necessity and propriety (in the sense in which the Constitution uses "necessary and proper") of such measures for regulating the military establishments our times require.

C. The Fifth Amendment's exception from the indictment requirement for "cases arising in the land or naval forces" covers precisely those cases governed by the military law Congress is empowered to prescribe under Article I, section 8, clause 14. *Kurtz* v. *Moffitt*, 115 U.S. 487, 500. Accordingly, the conclusion that the provision here in issue is authorized by Article I carries with it the conclusion that it is within the Fifth Amendment's exception. Moreover, the plain language of the exception compels the same result. A case arises "on the high seas," "in the land or naval forces,"

upon sworn charges scrutinized by the Secretary of the Air Force. The procedure compares not unfavorably with the arrest and removal of persons charged with offenses triable in the civil courts. There is no suggestion, beyond the broad claim that the Constitution forbids the military authorities to act at all, that Toth has been treated arbitrarily or unfairly. The broad claim is without substance. The assurance of sworn charges carefully reviewed, of a fair preliminary investigation, and of a fair trial—safeguarded ultimately by the right to habeas corpus should the military exceed its jurisdiction or offend against the "basic guarantees" it is enjoined to continue observing (*Burns* v. *Wilson*, 346 U.S. 137, 142-143)—amply satisfies Toth's right to procedural due process. Petitioner's due process argument cannot avail to prevent wholly the exercise of military jurisdiction once it is established that such jurisdiction was validly conferred under the Constitution by Congress.

ARGUMENT

In our view and in the view taken by Congress and the lower federal courts for over ninety years, the fundamental error in petitioner's approach to this case is embodied in the first sentence of her argument (Br. 14) declaring that Toth "at all times pertinent to the inquiry herein was a civilian." He was not a civilian at the most pertinent time involved, the time of the murder with which he is charged. He was an airman in the armed forces, subject to military law, on military assign-

ment outside the United States. The crime with which he is charged is not within the jurisdiction of any civil court of the United States; it is a violation of the Uniform Code of Military Justice governing personnel of the armed forces.[2] There is no dispute that, if his part in the death had been discovered immediately after its occurrence, before his discharge, he would have been subject to court-martial jurisdiction. Thus, there is no broad, abstract question of the power of the military to

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[2] Petitioner makes no suggestion here (cf. R. 42-43) that the offense is within the jurisdiction of any civil court. Such an argument would in any event be untenable. The offense charged was against a private individual, not an act directly injurious to the Government so as to warrant extraterritorial application of American criminal law. *United States* v. *Bowman*, 260 U.S. 94, 97-98; *Skiriotes* v. *Florida*, 313 U.S. 69, 73-74. Nor is there any basis for holding that the air base in Korea at which Toth's alleged offense occurred became American soil because American military forces were stationed thereon. In *Neely* v. *Henkel*, 180 U.S. 109, 120, this Court held that Cuba, though under the control of an American military governor, was a foreign country; see also *United States* v. *Assia*, 118 Fed. 915 (C.C. E.D.N.Y.), holding that one committing a crime on a vessel registered at a Cuban port while Cuba was under a United States governor was not subject to trial therefor in the courts of the United States.

It may also be noted, though this is not necessary to the assertion of court-martial jurisdiction over Toth, that there is at the very least serious doubt, in the American view, whether for this alleged crime on an American air base in Korea in the performance of official duties he would be subject to trial by the Republic of Korea. See *The Exchange* v. *M'Faddon*, 7 Cranch. 116, 139; *Tucker* v. *Alexandroff*, 183 U.S. 424, 433. Moreover, the United States has no extradition treaty with that Republic. Cf. *In re Lo Dolce*, 106 F. Supp. 455 (W.D. N.Y.), p. 28, n. 11, *infra*. In a word, Toth is triable by court-martial for the murder with which he is charged or he is not triable at all.

try a civilian. The precise issue is whether a soldier must be allowed to escape punishment for a serious crime committed while he was a soldier merely because his part in the crime was not discovered until after his discharge.

The injustice in the rule for which petitioner contends is self-evident. Under such a rule, it would be necessary to hold that if a murder were committed jointly by two soldiers outside the jurisdiction of a civil court of the United States, and one happened to be discharged before discovery and prosecution of the crime, the one remaining in service could be sentenced to death or confinement by a court-martial while the other escaped punishment entirely.[3] A rule requiring such an unjust result does not commend itself as reasonable. It did not commend itself to Congress, which endeavored by Article 3(a) of the Uniform Code to avoid the very result for which petitioner contends. It is the Government's position that Congress had the constitutional power to carry out its manifest purpose to provide that a discharge should not be an absolu-

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[3] According to the sworn charges against Toth (R. 15-16), this case appears to present precisely such a situation. Toth is alleged to have been an accomplice of Airman Kinder and Lieutenant Schreiber, both of whom have been tried and convicted by courts-martial. Both convictions have been affirmed by the Board of Review. Kinder has sought no further review; Schreiber's conviction is pending for review in the Court of Military Appeals. *United States* v. *Kinder*, 14 CMR 742 (February 1, 1954); *United States* v. *Schreiber*, 16 CMR 639 (June 15, 1954), Court of Military Appeals Docket No. 5468 (petition for review granted October 4, 1954; argued December 10, 1954).

tion for crimes theretofore committed" (R. 40) while subject to military authority; that Congress implemented this purpose with provisions for apprehension and trial by court-martial of persons within the statute; and that these procedures present no basis for complaint under the Constitution.

I

The Constitution Empowers Congress to Provide for Trial By Court-Martial of Crimes Committed by Members of The Armed Forces, Despite Their Subsequent Separation from the Service

Petitioner cannot and does not dispute that Congress intended in Article 3(a) of the Uniform Code to confer court-martial jurisdiction over crimes of the category here presented—*i.e.*, serious crimes, not triable by a civil court of the United States, committed by persons subject to military law who were discharged before charges were preferred against them. Article 3(a) is explicit in this matter.[4] It provides:

[4] Article 3(b) and (c) provide:

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall, subject to the provisions of article 43, be subject to trial by court-martial on said charge and shall after apprehension be subject to this code while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this code committed prior to the fraudulent discharge.

(c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent period of service.

> Subject to the provisions of article 43,[5] any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Judged by its actual application in this case, the Article is clearly valid. It represents a power Congress has exercised for over ninety years with the repeated approval of the lower federal courts. It falls squarely within the constitutional grant in Article I, section 8, clause 14, of power "To make Rules for the Government and Regulation of the land and naval Forces" and within the Fifth Amendment's exception to the indictment requirement for "cases arising in the land or naval forces."

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[5] Article 43 of the Code provides that for all but a few crimes or offenses, exemption from liability to be tried by a court-martial may, with certain limitations, be claimed after two (or three) years. Article 43 also provides that persons charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder may be tried and punished at any time without limitation.

A. *The power in question has been exercised by Congress and sustained by the courts for over ninety years.*

The question here is not a novel one. Beginning in 1863, Congress provided that separation from military service would not operate to bar trial by court-martial for crimes involving fraud against the Government committed while the accused was in service.[6] Unlike Article 3(a) of the present Uniform Code, the statute governed frauds generally and was not confined to cases where no civil court of the United States had jurisdiction to try the offense. It applied, moreover, without regard to the punishment which might be imposed, whereas Article 3(a) is effective only where the offense is punishable by more than five years' imprisonment. The long-standing enactment of 1863, renewed on several occasions and remaining continuously in force until the date of the Uniform Code,[7] is in itself a weighty legislative judgment in favor of the power now questioned again. It must, as petitioner necessarily recognizes (Br. 10-11), be condemned as a persevering violation of the Constitution if the present attack on Article 3(a) is to prevail.

The lower courts, however, have repeatedly up-

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[6] Act of March 2, 1863, 12 Stat. 696, 697.

[7] Provisions substantially similar to the original Act appear as Article of War 60, R.S. 1342 (1878); Article of War 94 (1920), 41 Stat. 805, 10 U.S.C. (1946 ed.) 1566; Article of War 94 (1948), 62 Stat. 640, 10 U.S.C. (1946 ed., Supp. IV) 1566; Article 14 (Eleventh), Articles for the Government of the Navy, R.S. 1624 (1878), 34 U.S.C. (1946 ed.) 1200.

held the 1863 statute. Beginning in 1873, in *In re Bogart,* 3 Fed. Cas. 796 (C.C.D. Cal.), arguments precisely like those the petitioner urges have been rejected and Congress has been found to have power to require trial by court-martial of discharged servicemen for crimes committed in the service. *Ex parte Joly,* 290 Fed. 858 (S.D. N.Y.); *Terry* v. *United States,* 2 F. Supp. 962 (W.D. Wash.); *United States ex rel. Marino* v. *Hildreth,* 61 F. Supp. 667 (E.D. N.Y.); *Kronberg* v. *Hale,* 180 F. 2d 128 (C.A. 9), certiorari denied, 339 U.S. 969.[8] The lone decision to the contrary, *United States ex rel. Flannery* v. *Commanding General,* 69 F. Supp. 661 (S.D. N.Y.), the error of which is repeated by petitioner and discussed below (pp. 38-39), was reversed by stipulation in an unreported order of the Second Circuit. No. 20235, April 18, 1946; see *Kronberg* v. *Hale, supra,* at 130.[9]

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[8] Petitioner correctly observes (Br. 20-21) that Colonel Winthrop, an admittedly eminent authority in the field of military law, doubted the constitutionality of the 1863 statute. But as the court pointed out in *Ex parte Joly, supra,* at 860, the Colonel recognized that his views were contrary to judicial precedent. *Military Law and Precedents* (2d ed., 1920 reprint), pp. 106-107. Professor Morgan, who was to play a leading role in the drafting of the Uniform Code of Military Justice, concluded in 1920 that the matter of continuing court-martial jurisdiction for crimes committed in the service presents no constitutional difficulty. *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War,* 4 Minn. L. Rev. 79, 83-84.

[9] Other cases cited by petitioner (Br. 30-31, 35) along with *Flannery* concern the statutory jurisdiction of courts-martial not the scope of the power of Congress to confer such jurisdiction. As reflected by its citation in *Hirshberg* v. *Cooke,* 336 U.S. 210, 214, *Ex parte Henderson,* 11 Fed. Cas. 1067

In *Hirshberg* v. *Cooke*, 336 U.S. 210, holding that there was no statutory authority for trial by court-martial of a crime outside the purview of a successor to the 1863 statute following termination of the enlistment during which the crime was committed, this Court found the statute persuasive that Congress had acted "on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service." P. 215. The Court then observed *(ibid.)* that "Acting on this assumption, Congress granted such a power to courts-martial but only in the very limited category of offenses there defined —frauds against the Government." There was, to be sure, no need to consider in *Hirshberg* the constitutional validity of Congress' judgment that it could exercise the power asserted in the 1863

(C.C. D. Ky.), concerned a portion of the 1863 statute under which a civilian war contractor, who had never been in the military service, was brought to trial before a court-martial. The court there stressed the fact that there was no allegation that the relator "is or has been an officer or soldier in the army" (p. 1069; see also p. 1071), thus clearly distinguishing the problem of the present case and the cases cited above in the text.

A less important matter bears brief mention. Though not reported until 1878, and described by petitioner (Br. 34) as being written "with full knowledge of the *Bogart* opinion" (*supra*), the *Henderson* decision appears from internal evidence to have been rendered some time in 1866 or 1867, considerably before the decision of *Bogart* in 1873. See 11 Fed. Cas. at 1068, indicating that the writ there granted was applied for on April 23, 1866. The remainder of the opinion shows that there was some delay in disposing of the case, but not extending to years, and that it was decided while the Civil War remained very recent.

statute. It seems noteworthy, nevertheless, as two Courts of Appeals have observed, that "There is in the opinion no intimation of possible doubt as to the authority of Congress to make such a grant in circumstances believed by it to be necessary." *Kronberg* v. *Hale*, 180 F. 2d 128, 131 (C.A. 9), certiorari denied, 339 U.S. 969; opinion below, R. 41-42. This Court merely described the 1863 grant as a "comparatively slight expansion of the court-martial power" (336 U.S. at 215, n. 2)—though it was in significant respects broader than Article 3(a). (*supra*, p. 17)—and held only that, without such a statute, discharged servicemen could not be tried by court-martial for offenses committed in the service.

And so Congress undertook in Article 3(a) to fill the statutory gap evidenced by the *Hirshberg* decision. As originally drafted, this Article had provided that reserve personnel who had committed an offense while in a status in which they were subject to the Code might be placed in an active-duty status for the purpose of disciplinary action. H.R. 2498, 81st Cong., 1st Sess.; see Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498, House of Representatives, 81st Cong., 1st Sess., p. 567. During the hearings, questions were raised concerning *Hirshberg*. Professor Morgan observed that the decision had been based upon a construction of the Articles then in force, and Congressman Elston expressed the view that the situation should be changed. House Hearings, *supra*, at 617. Mr. Elston noted that,

under the then existing law, a "man might commit murder the day before his term of enlistment was up and step out of the service" immune to prosecution (*id.*, p. 882), and commented on the unfairness of prosecuting a soldier remaining in service while one who was discharged escaped punishment for the same offense (*id.*, p. 883). It was agreed that the proposed provision should not cover minor offenses or offenses triable by the civil courts. *Id.*, pp. 882-884.

Discussing the Article 3(a) which resulted from these deliberations the House Report stated (H. Rep. No. 491, 81st Cong., 1st Sess., p. 5):

> As a matter of fact, the military authorities have been most reluctant to prosecute the average offender who succeeds in returning to a civilian status before the discovery of his crime. On the other hand, the military authorities have found themselves confronted with a lack of jurisdiction to try certain aggravated cases of this character. You will recall the Durant jewel case. That case involved the theft of the crown jewels of Hesse. At the time Mrs. Durant, one of the accused, was apprehended, she was in a terminal-leave status. The point was raised by a petition for a writ of habeas corpus that the Army had ceased to have jurisdiction over the accused since her active service was terminated and she was only completing the unexpired portion of her terminal leave. A writ of habeas corpus

was granted in district court but ultimately reversed on the theory that the terminal-leave status is a service status and subjects one to the Articles of War. If charges and specifications had not been served on the accused until after the expiration of her terminal leave, neither the military nor our Federal courts would have had any jurisdiction over the case. You will also recall the more recent Hershberg [*sic*] case. Hershberg [*sic*] was a Navy enlisted man who allegedly abused other American military personnel who were under his supervision while they were all prisoners of war of the Japanese. Hershberg's [*sic*] term of enlistment expire and after 1 day he reenlisted. The Navy then attempted to prosecute him for the alleged abuse of American persons. *A writ of habeas corpus was granted in that case, not because it would be unconstitutional to provide for a continuing jurisdiction in such cases, but because the present Navy statute confers no such continuing jurisdiction.*

We felt that there was a solution to this problem and our proposed solution is offered in article 3(a) which is a committee amendment to H.R. 2498. It provides for a continuing jurisdiction provided the offense against this code is punishable by confinement of 5 years or more and provided further that the offense is not triable in a State or Federal court of the United States. We feel that this will pro-

vide ample protection against any capricious action on the part of military authorities, will limit military jurisdiction to serious offenses that could not otherwise be tried by military or Federal courts and will likewise correct the absurd situation of permitting an honorable discharge to operate as a bar to a prosecution for murder or other serious offenses. [Emphasis added.]

Although the Judge Advocate General of the Army opposed Article 3(a) as amended, recommending that offenses in the service by servicemen thereafter discharged, even though committed overseas, be made triable by civil courts (Hearings before a Subcommittee of the Committee on Armed Services on S. 857 and H.R. 4080, United States Senate, 81st Cong., 1st Sess., pp. 256-257), the Senate Committee agreed with the House version. Its report (Sen. Rep. No. 486, 81st Cong., 1st Sess., p. 8) states:

Article 3. *Jurisdiction to try certain personnel.* Subdivision (a) represents a House amendment to the bill as originally introduced. Under existing law, the armed forces lose jurisdiction over military personnel who have been lawfully separated from service. This fact has been clearly established in the recent Federal court decision in the Hershberg [*sic*] case. Inasmuch as the Hershberg [*sic*] case involved an offense which was committed beyond the jurisdiction of our State and Federal

courts, there is no tribunal which has any jurisdiction over the person or the offense. It is clearly apparent that some persons can escape trial by court-martial by the mere lawful termination of service. This is not a desirable situation. On the other hand, it is desirable to place some limitations on continuing jurisdiction over persons who commit offenses while subject to military law and who terminate their military status before apprehension. In the opinion of the committee the present provisions of this subdivision provide a desirable degree of continuing jurisdiction and at the same time place sufficient limitations on the continuing jurisdiction to prevent capricious actions on the part of military authorities.

There is no doubt, then, that the Congress which enacted Article 3(a) was concerned with precisely the type of situation this case presents. And ninety years of history lend powerful sanction to the remedy Congress chose. The fact remains, however, that the issues petitioner poses have not been considered on their merits by this Court. And so we turn to a fresh re-examination of these issues to show that Congress, the lower courts, and the military authorities have not been guilty of violating the Constitution for almost a century.

B. *Article 3(a) of the Uniform Code of Military Justice is within the power of Congress "To Make Rules for the Government and Regulation of the land and naval Forces."*

As a necessary accompaniment of its power under the Constitution "To raise and support Armies" and "To provide and maintain a Navy" (Art. I, sec. 8, cls. 12 and 13), Congress has power "To make Rules for the Government and Regulation of the land and naval Forces" (*id.*, cl. 14). Describing these powers in a close paraphrase of the Constitution's own terms, this Court has pointed out that Congress "can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment." *Tarble's Case*, 13 Wall. 397, 408. Again, speaking of what the Framers intended by the plain language of clause 14, the Court found "that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations * * *." *Dynes* v. *Hoover*, 20 How. 65, 79.[10]

[10] As early as 1760, it was recognized under English military law, from which our military law derived directly (*Caldwell* v. *Parker*, 252 U.S. 376, 382; Winthrop, *Military Law and Precedents* (2d ed., 1920 reprint), pp. 21-22), that separation from military service would not necessarily terminate amenability to court-martial jurisdiction. Thus, Tytler, in *Military Law* (3d ed., 1814), pp. 113-114, wrote:

> It had formerly been a matter of doubt, whether an officer or soldier, after being dismissed or discharged from his Majesty's service, could be brought to trial before a Court-Martial, for a crime committed while he was in

Though it plainly authorizes Congress to prescribe trial by court-martial of offenses by some civilians —*i.e.*, persons who are members of the armed forces neither at the time of their offenses nor when they are brought to trial (p. 31, n. 14, *infra*)—the most unmistakable effect of clause 14 is its grant of "plenary" power to provide for "the punish-

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commission, or in pay; the terms of the before mentioned clause apparently confining the operation of the Military law to those who are actually either in commission or in pay. The point came to be solemnly determined in the case of Lord George Sackville, who immediately on his return to England, after the battle of Minden, had been deprived by his Majesty of all military command and commission, but was not brought to trial for his conduct in that engagement till some months afterwards, in consequence of his own demand of a Court-Martial. The question was referred to the opinion of the twelve Judges, who, by their answer, unanimously declared, that "they saw no ground to doubt of the legality of the jurisdiction of a Court-Martial in those circumstances."

Commenting on this report, a decision in the Supreme Judicial Court of Massachusetts in 1830 observed (*Walker* v. *Morris*, 3 American Jurist 281, 287):

> It is true that that trial was had on the application of the party accused, who having been dismissed from the service during his absence from England, thought it was due to his reputation, upon his return, to demand an investigation of his conduct, to relieve himself from the disgrace. But I do not perceive that this circumstance can affect the principle of the decision; for if the court martial had no jurisdiction, it is very clear that the consent of the accused could not confer it.

In 1865, two years after it created continuing court-martial jurisdiction for crimes of fraud (*supra*, p. 17), Congress provided that an officer could, as in the above-described English case, request a court-martial trial to test his dismissal by the President. Act of March 3, 1865, Sec. 12, 13 Stat. 487, 489; see Winthrop, *op. cit.*, *supra*, pp. 64-65. Today's similar provision is Article 4 of the Uniform Code (50 U.S.C. 554).

ment of offences committed by persons in the military service * * *." *Coleman* v. *Tennessee*, 97 U.S. 509, 514. And this, of course, is precisely the power cautiously exercised by Congress in Article 3(a) and carefully applied to this case of Robert Toth, who, it is charged, is guilty of a murder committed while he was "in the military service."

Considering for the moment the language of Article I alone, only an extraordinarily hostile construction could deny to Congress the power petitioner questions. See Morgan, *"Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 83-84 (1920). Alerted by the decision of this Court in *Hirshberg* v. *Cooke*, 336 U.S. 210, and concerned with the government of armed forces which the necessities of our time have deployed across the world, Congress recognized that shocking offenses by members of those forces might go wholly unpunished if the offenders succeeded in being separated from the service before discovery or prosecution of their crimes. See *In re Lo Dolce*, 106 F. Supp. 455 (W.D.N.Y.); Myers and Kaplan, *Crime without Punishment*, 35 Geo. L. J. 303 (1947); pp. 20-24, *supra*. It was entirely reasonable to conclude that this possibility represented, in the most sharply literal sense, a gap in our "Rules for the Government and Regulation of the land and naval Forces." And Congress, in the traditional spirit of guarded conservatism which has characterized its grants of military jurisdiction (cf. *Burns* v. *Wilson*, 346 U.S. 137, 140-141), legislated narrowly to reach

only the formerly ungoverned class of serious crimes like the one in this case.[11]

The resulting Article 3(a) is a plainly "appropriate" exercise of the power to govern the land and naval forces—"necessary and proper" in the sense in which the phrase confides to the judgment of Congress the choice of achieving legitimate ends by means consistent "with the letter and spirit of the constitution * * *." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Legal Tender Case*,

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[11] The present case is an apt illustration of the problem in one of its aspects. According to the charges against Toth (R. 16, 89; and see R. 59-60, 61-62), the crime of which he is accused was the deliberate shooting, following a pistol-whipping, of a Korean national while our forces were stationed in South Korea and fighting in its support. It needs no argument to demonstrate that certain punishment of such offenses is an appropriate adjunct of our massive efforts to make and sustain and keep allies around the world.

The problem is not confined, of course, to crimes against foreign nationals. The *Lo Dolce* case, cited in the text above, involved the murder of an American major by subordinates with whom he was engaged in partisan operations behind enemy (German) lines in Italy during World War II. The crime was discovered only following separation from the service of the alleged perpetrators. The Italian Government failed in its effort to extradite Lo Dolce, who had admitted his part in the crime; no civil court of the United States could try him; and the then existing Articles of War made no provision for trial by court-martial. *Hirshberg* v. *Cook, supra*. The House Subcommittee investigating the case, after concluding that there was no way of bringing the murderers to justice, observed that "The Uniform Code of Military Justice now provides a stop-gap for further incidents of this nature as reflected in the present Toth case * * *." Report of the Special Subcommittee of the Committee on Armed Services, under the Authority of H. Res. 125, 83d Cong., 1st Sess. ("Report and Recommendations surrounding the Disappearance of Maj. William V. Holohan"), p. 15 (July 16, 1953).

110 U.S. 421, 440.[12] Other "civilized nations" (see *Dynes v. Hoover, supra*, at 79), with a commonly derived military law and a common heritage of concern for individual liberty and the subordination of military to civilian power, have found necessary the enactment of measures comparable to Article 3(a). Thus, a discharged British, Canadian, or Australian serviceman, charged with a crime like the one of which Toth is accused, would remain, like him, subject to apprehension by the military and trial by court-martial.[13] Common

[12] "The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *." Constitution, Art. I, sec. 8, cl. 18.

[13] Section 158 of the British Army Act (Gt. Brit., Stat. Rev. (3d ed.), vol. X, 457, 563-564; War Office, *Manual of Military Law*, Pt. I, 1951, 376-377) provides:

> (1) Where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he, or the corps or battalion to which he belongs, has ceased to be subject to military law in like manner as he might have been taken into and kept in military custody, tried or punished, if he or such corps or battalion had continued so subject:
>
> Provided that where a person has since the commission of an offence ceased to be subject to military law, he shall not be tried for such offence, except in the case of the offence of mutiny, desertion, or fraudulent enlistment, unless his trial commences within three months after he had ceased to be subject to military law, or *unless the offence was committed outside the United Kingdom and is an offence which when committed in England is punishable by the law of England, and the Attorney General consents to the trial* * * *. [Emphasis added.]

See also the Defence Act of Australia, Section 103(3), Commonwealth Acts, vol. II (1901-1950), 1560, 1596; National

problems of control and discipline over military personnel, dramatically evidenced by the joint Korean operations during which the alleged offense in this case occurred, have evoked these closely similar legislative solutions. The similarities are impressive not only because it is in a general way pertinent that the power of Congress to govern the armed forces was designed as one "to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations * * *." *Dynes* v. *Hoover*, *supra*, at 79. More specifically, these analogous enactments testify to the conclusion we have thought plain enough from the language of the Constitu-

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Defence Act of Canada, 1950, Sections 56(2) and (3) and 68(f), Revised Statutes of Canada, 1952, vol. III, 3814 and 3821.

New Zealand has a similar statute (Army Act, Section 127 (1), New Zealand Statutes, 1950, 283, 370-371). We have omitted mention of New Zealand in the text only because its three-month limitation on prosecutions after separation from the service, unqualified by the exception emphasized above in the British Act, would appear to exclude a person like Toth against whom charges were not signed until four months after his discharge. However, the important point remains, of course, that New Zealand like the others has found it necessary and proper to extend court-martial jurisdiction for offenses committed in the service beyond the date of the offender's separation from the service. The rest is for present purposes unimportant detail—including among other things the fact that none of the four statutes cited confines post-separation military jurisdiction, as does the American statute, solely to offenses not triable in the civil courts.

The British Army Act, including the provision in Section 158 for court-martial after termination of military service, dates from 1881. 17 Law Reports, (Statutes), 44 and 45 Vict., 260, 331.

tion itself—that a provision like Article 3(a) is in fact a fitting exercise of control over the armed forces, falling squarely within the language and purpose of the authorization "To make Rules for the Government and Regulation of the land and naval Forces."[14]

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[14] It may be noted that petitioner is mistaken in the generalization (Br. 35) "that only those persons who are actually in service are amenable to military trial and justice." The jurisdiction has never been so limited. Civilians accompanying the armed forces but never "actually in service" as members of the armed forces have long been subject to trial by courts-martial—including not only persons employed by the military (*United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904; *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645; *Ex parte Gerlach*, 247 Fed. 616 (S.D. N.Y.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E.D. Va.); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio); *Grewe* v. *France*, 75 F. Supp. 433 (E.D. Wis.); see *Madsen* v. *Kinsella*, 343 U.S. 341, 349; *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313, 315), but even, it seems clear, so non-military a civilian as a soldier's wife accompanying him overseas (see *Madsen* v. *Kinsella*, *supra*, at 345, 349-352). And persons serving sentences imposed by courts-martial—who, far from being "actually in service," have been dishonorably discharged from such status—are likewise triable by court-martial for offenses during confinement. *Kahn* v. *Anderson*, 255 U.S. 1; *Mosher* v. *Hunter*, 143 F. 2d 745 (C.A. 10); cf. *Carter* v. *McClaughry*, 183 U.S. 365.

We do not cite these instances of court-martial jurisdiction over persons not in the military service as dispositive of the present problem. Indeed, we think the constitutional case is, if anything, clearer for the court-martial of Toth, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces. The cases referred to do, however, help to dispel the notion that a civilian, by virtue of being a civilian rather than a soldier, is always necessarily beyond the reach of military law.

C. Article 3(a) is within the Fifth Amendment's exception for "cases arising in the land or naval forces".

The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces* * * *." (Emphasis added.) It is settled, of course, that Congress may provide for trial by court-martial of cases within the exception we have italicized. *Ex parte Quirin*, 317 U.S. 1, 40; *Madsen* v. *Kinsella*, 343 U.S. 341, 360 n. 26. But petitioner contends that Article 3(a) is invalid and that Toth may not be tried by court-martial because this case falls outside the Fifth Amendment's exception. Though Toth was serving in the armed forces at the time of his alleged offense, though he and the offense were unquestionably governed solely by military law at the time, petitioner contends that this "case" cannot be deemed one "arising in the land or naval forces" because the court-martial proceedings were not instituted until after his discharge. The argument is refuted by the plain language of the exception and by its purpose in the constitutional scheme.

If, as we have argued above, Article 3(a) is authorized by the constitutional grant in Article I, section 8, clause 14, to make rules for the government of the land and naval forces, this should in itself be sufficient to defeat the contention petitioner predicates upon the Fifth Amendment. For

the exception in that Amendment was designed precisely as an *exception* to the Amendment's reach, not as an abridgement of the power already conferred by Article I. The plain purpose and meaning of the exception for "cases arising in the land or naval forces" is that it "leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the First Article of the Constitution, Congress is empowered to make." *Kurtz* v. *Moffitt*, 115 U.S. 487, 500; see also *Ex parte Milligan*, 4 Wall. 2, 137-138 (concurring opinion of Chief Justice Chase joined by Justices Wayne, Swayne, and Miller). It seems probable that, had no such exception been written, the requirements of indictment and trial by jury would nevertheless have been held inapplicable to courts-martial, as they are to other military tribunals. *Ex parte Quirin*, 317 U.S. 1, 38-45. The fact that the exception was made explicit affords no ground for the claim that the power thus expressly preserved was at the same time diminished, with no change in or reference whatsoever to the clause of Article I in which the power finds its source.

When we turn to the exact language of the Fifth Amendment, it clearly presents no such barrier as petitioner finds to punishment by court-martial for offenses under military law despite the offender's subsequent separation from the service. This "case" "arose" in the armed forces, not only in the ordinary dictionary sense petitioner condemns (Br. 33-34), but also in a sense which has long been

familiar to the law. It arose there in the wholly sufficient sense that (1) Toth was a member of those forces at the time of his alleged offense and (2) the offense was one against the rules governing those forces and against those rules alone. To find in the phrase the further requirement petitioner proposes—that the court-martial proceedings must be commenced while the defendant is still in the armed forces in order that the case may be deemed to "arise" therein—distorts the English language.

It is surely common, familiar usage of lawyers, as it was when the Constitution was written, to refer to "the waters on which * * * cases may arise" (*United States* v. *Bevans*, 3 Wheat. 336, 388), to a "case of collision taking place on the Mississippi river" (*Waring et al.* v. *Clarke*, 5 How. 441, 466), to a "cause of action arisen on the ocean" (*id.* at 467), to "cases * * * arising on the high seas" (*id.* at 487, dissenting opinion).[15] Such usage, of which we present simply the first random instances that have come readily to hand, refers of course to the locale of events, not to where any of the litigants are situated when their legal proceedings begin. It reflects the well-understood fact that a "case" is properly described as "arising"—and particularly for the purpose of determining the law which governs it—at the time and place of the happenings which give rise to it. See *De Lovio*

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[15] The dissent last cited quotes from Blackstone (3 Bl. Comm. 106) a reference to "causes arising wholly upon the sea * * * *." 5 How. at 487.

v. *Bolt*, 7 Fed. Cas. 418, 432, 434-435 (C.C.D. Mass.) (Story, Circuit Justice).

The point was simply and adequately made in 1863 when Congress first decreed that members of the armed forces violating military law should remain amenable to trial by court-martial after separation from the service. Senator Howard, in charge of the bill, said (Cong. Globe, 37th Cong., 3d Sess., 953):

> The question arises, what is a "case arising in the land or naval forces of the United States?" There is not any doubt that a soldier or officer who has enlisted in the service of the United States is or may be made subject to martial law. Why is he made subject to martial law? Because being in the service of the United States, the act committed by him is a case arising in that service.

There was no dissent from this proposition. The "grave doubts" petitioner describes (Br. 32, n. 7) as to the constitutionality of the bill were directed exclusively to the proposal to subject war contractors, who were at no time actually members of the armed forces, to trial by court-martial for fraud. Cong. Globe, *supra*, 953-958; see *Hirshberg* v. *Cooke*, 336 U. S. 210, 214. No one suggested any doubt that an offense against military law by one in the armed services creates a case "arising in the land or naval forces," punishable by court-martial, as the bill provided, though the offender's

service ended before proceedings were begun against him.

And the courts, as we have noted, have agreed. In the earliest of the cases rejecting the argument petitioner revives here (*In re Bogart*, 3 Fed. Cas. 796, C.C. D. Cal., 1873), Judge Sawyer said (pp. 799-800):

> If the acts of congress conferring jurisdiction upon naval and military courts-martial, to try offenses committed in the naval and military service, are held to be constitutional, it is further insisted, on behalf of the petitioner, that the offense must not only be committed, but that the jurisdiction must also be exercised, or, at least, must attach by an arrest and commencement of the prosecution before the connection of the offender with the service is legally severed by the expiration of his term of service, or by resignation, dismissal or other discharge; that congress has no power to authorize a trial after the connection is so severed, and after the accused has become a private citizen. To support this view, a criticism is made upon the word "case," and it is argued that, although the offense has been committed while in the naval service, yet a "case" does not arise until a charge is actually made; and if the charge is not actually framed and presented till after the offender ceases to be in the service, it is not a "case arising in the land or naval forces" within the meaning of the fifth amendment to the con-

stitution. This is certainly a very finely drawn distinction. It is not merely a "case" that the court is to try, but "a case arising in the land or naval force." A case in ordinary parlance is that which falls, comes, or happens—an event. Also a state of acts involving a question for discussion. Webst. Dict. But the event—that which happens—the state of facts presenting the question for discussion, must have arisen—must have had an origin. What does "arising" mean as here used? Certainly not merely making a statement of the pre-existing facts, which constitutes a case for judicial cognizance. Among the ordinary and most common definitions of the word "arise," are "to proceed, to issue, to spring," and a case arising in the land or naval forces upon a fair and reasonable construction of the whole article, appears to us to be a case proceeding, issuing or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service. A case originating in the naval forces or service, or, in other words, "offenses" against the laws regulating the navy, committed by a party while in the naval forces. * * * There is, certainly, no express limitation of the power of congress to authorize a trial by court-martial, for military and naval offenses committed while the offender is in actual service, after his connection with the service has ceased. If the limitation exists, it must be implied from a strained and unnatural construction to be given to the

clause, "cases arising in the land and naval forces."

In support of the "strained and unnatural construction" thus sufficiently demolished eighty years ago, petitioner invokes decisions interpreting the provision in Article III of the Constitution for "cases * * * arising under" the Constitution, laws, and treaties of the United States (Br. 27-30). Not surprisingly, these decisions, in determining the nature of a "case" or "controversy" *within the judicial power*, refer to proceedings brought into court before judges. And there is certainly no occasion here to quarrel over the tautology that a "case" before a court is a legal proceeding already instituted by appropriate legal process. The important point remains that not a word in the decisions petitioner cites alters the clear linguistic fact that when a "case" is described as "arising" in a particular place—"on the high seas" or "in the land or naval forces"—the reference is to the place of the events subsequently litigated, not to the litigation itself.

Petitioner's fallacy is the familiar one of attempting to transplant perfectly suitable meanings from the context in which they fit to contexts in which they have no place. Cf. *Towne* v. *Eisner*, 245 U.S. 418, 425. The hopelessness of the effort is adequately illustrated here by one of the authorities petitioner cites. The first sentence of the opinion in *Muskrat* v. *United States*, 219 U.S. 346,

begins: "These cases arise under an act of Congress" (p. 348). Thereafter, the Court repeatedly refers to the matters before it as "cases" (*e.g.*, pp. 351, 357, 360, 363), which is obviously what they were. Yet the decision was of course that they were not "cases" at all within the meaning of Article III of the Constitution. Fairly described as "cases [arising] under an act of Congress" (in the statutory sense), they were nevertheless not "cases * * * arising under * * * * the laws of the United States" (in the sense of Article III).

We submit, in sum, that petitioner's definition of the exception in the Fifth Amendment is untenable. It would appear by that definition that a trial by court-martial could be had for a civilian crime, wholly unconnected with the armed forces, if the accused subsequently joined and was brought to trial in the service. For this presumably would be, according to petitioner, a case "arising" in the armed forces. The suggested construction is both too narrow and too broad; it misses the point of the constitutional provisions. The issue is to be resolved, not by tearing the words "case" and "arising" from the wholly different context of Article III, but by reading the language of the exception in its ordinary meaning and by relating the exception to the cases provided for in Article I which were designed to be excepted.

II.

Congress Has Provided Effective Procedures, Which Accord With Due Process, for the Apprehension and Trial Of Discharged Persons Subject to Military Jurisdiction

Two contentions are considered here: First, petitioner argues (Br. 37-43) that, despite the clearly expressed purpose of Congress to extend court-martial jurisdiction to cases such as this, Congress neglected to provide the machinery necessary to this end—that it provided for neither apprehension nor confinement of persons like Toth. Alternatively, petitioner claims (Br. 36-37) that if the necessary procedures exist, they violate due process. Both arguments are erroneous.

A. The procedures are plainly prescribed by the Code

In the argument that Congress made no provision for apprehending and holding for trial persons within Article 3(a), petitioner misreads Articles 7 and 9 of the Uniform Code, which fully and clearly cover this problem. These Articles provide in pertinent part:

> Article 7 (50 U. S. C. 561):
>
> (a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code *or to trial thereunder* may do so upon reasonable belief that an offense has been committed and that the

person apprehended committed it. [Emphasis added.]

Article 9 (50 U. S. C. 563):

(a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

* * * * *

(c) An officer, a warrant officer, *or a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject*, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. [Emphasis added.]

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

No more is required than a reading of these Articles to demonstrate that Congress provided specifically for the apprehension—"taking into custody" (Article 7(a))—and restraint or confinement (Article 9(a) and (c)) of persons subject

to trial by court-martial under Article 3(a).[16] It is suggested (Pet. Br. 43) that Article 7 confers no authority to apprehend Toth because it applies to "persons subject to this code," a phrase which, petitioner says, is a term of art referring only to persons specified in Article 2. But the suggestion stops short of the decisive language of Article 7, which authorizes apprehension of "persons subject to this code *or to trial thereunder*. * * *." The words we have emphasized cover precisely persons like Toth and others included in the various provisions of Article 3, all of which deal with persons who have committed offenses while in military service and have either deserted or been discharged from the service before the time of their apprehension.

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[16] As the Articles themselves state, the Code uses the term "apprehension" (Article 7) to mean what is commonly described in civilian terminology as "arrest." The terms "arrest" and "confinement" as used in Article 9 cover the detention of an apprehended person pending trial. At the House Hearings, *supra*, p. 902, the terminology was explained by Mr. Larkin of the Office of the Secretary of Defense as follows:

> This is new in format, more than in anything else, Mr. Chairman. In our study of the Articles of War and the Articles for the Government of the Navy we found a certain duality of meaning in the words "arrest", "restraint", "confinement", and words of that character, and we adopted this scheme to clarify the definitions of those words and started off with "apprehension" in article 7.
>
> * * * * * * *
>
> Article 7, then, is part of a whole revision, the rest of which is contained in articles 9 and 10 and I think just clarifies it. It clarifies the whole notion of what is arrest, restraint, confinement, and so forth.

Next, petitioner claims (Br. 40) that "there is no authority to hold him in custody once his apprehension has been effected." This conclusion is said to follow (Pet. Br. 39, 42) from the fact that Article 9(c) provides that "a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement *only by a commanding officer to whose authority he is subject*" (emphasis added). Toth, petitioner says (Br. 39), "as a civilian, had no commanding officer 'to whose authority he is subject.'" But the Article just quoted refers explicitly to "a civilian subject * * * to trial" under the Code and leaves no doubt, when read with the jurisdictional grant in Article 3(a), that there is of course "a commanding officer to whose authority" such a civilian is subject. That commanding officer is designated in due course by order or regulation.

Petitioner's argument comes down to the frivolous suggestion that, in the face of what Congress explicitly wrote, the carefully detailed procedures come to nought because the Code does not *specify* the commanding officer to whose authority Toth was subject. The same argument could be made for a deserter whose unit or organization has been inactivated before his apprehension. Indeed, the argument could be made for any soldier or civilian "subject to this code or to trial thereunder," for there is nowhere in the Code any designation of the particular commanding officer of Private Jones or of a civilian "serving with, employed by, or accompanying the armed forces" outside the United

States who is made subject to the Code by Article 2(11), 50 U. S. C. 552(11). The short of this matter is that the Code outlines in ample detail the nature of the military jurisdiction and the accompanying powers of officers in the military establishment. The particular individuals exercising these powers in a particular case are, naturally, not named or designated by specific rank and organization in the Code. These details, like the command of armies in the field, are necessarily filled in by appropriate orders and regulations duly delegating the authority Congress conferred.

There is no suggestion that any step in the apprehension and restraint of Toth, beginning with the direction of the Secretary of the Air Force (R. 19-20), was accomplished otherwise than by officers exercising proper command authority. There is only the claim that the meticulous legislative efforts expended on Articles 3(a), 7, and 9 cannot possibly work because, despite them, Toth cannot possibly be viewed under the statute as being subject to the authority of any commanding officer. Mr. Justice Holmes more than answered such an argument when he said "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 Fed. 30, 32 (C. A. 1). Here, Congress has plainly "said it" and there is no ground for the argument, as petitioner herself describes it (Br. 42), that the legislation was written in "a confounding or abortive manner."

B. *The procedures applicable to persons within Article 3(a), as they are to other persons subject to trial under the Code, accord with due process*

There is no question that Toth was given ample opportunity to test the military jurisdiction before his removal to the place of his alleged crime in Korea (see R. 64, 70) and that he has had such an opportunity on this petition for habeas corpus after his arrival in Korea. Nor is there any suggestion of doubt that other persons subject to trial by court-martial may be brought to trial in any appropriate place.[17] Petitioner argues, however (Br. 36-37), that Toth's right to due process was violated when he was apprehended, held, and brought for trial to the place of his alleged offense in Korea.

The argument is without foundation. If, as we think has been demonstrated, the Constitution empowers Congress to provide for military jurisdiction over Toth, there is no ground for prohibiting the exercise of this jurisdiction by means of the procedures generally applicable. Congress has provided that Toth, like other Americans subject to military law, shall have a fair trial conforming "to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." *Burns v. Wilson*, 346

[17] There is no territorial limitation upon the jurisdiction of courts-martial. Article 5 of the Uniform Code (50 U.S.C. 555) provides that "This code shall be applicable in all places." See Winthrop, *op. cit. supra*, p. 81.

U. S. 137, 143. It has narrowly confined the power here in question; the power has been exercised with care and on high authority. Due process requires no more.

1. Article 3(a), as we have noted, is limited to discharged servicemen whose alleged offenses committed in the service are both serious and outside the jurisdiction of any civil court.[18] Article 30 (50 U. S. C. 601) provides generally that charges may be preferred only under oath and by a person subject to the Code who "has personal knowledge of, or has investigated, the matters set forth therein * * *." And paragraph 11*b* of the *Manual for Courts-Martial* provides that jurisdiction under Article 3(a) "should not be exercised without the consent of the Secretary of the Department concerned." Thus, the statutory provision and the implementing regulations are designed to insure that,

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[18] Petitioner forecasts (Br. 45) that because the Table of Maximum Punishments (*Manual for Courts-Martial*, 1951, par. 127*c*) is suspended in time of war for certain offenses involving essentially military discipline (*id.*, p. 217), and because the President ordered such suspension for the certainly war-like situation of the Far East Command in 1951, the purpose of Congress to limit to serious offenses the continuing military jurisdiction over discharged personnel will not be respected. No such question is here involved. In this case the charge is murder, and murder is the very type of the serious offense with which Congress was concerned. So there is no need now to accept or reject petitioner's abstract assumption that, in time of war, a day's absence without leave or missing a movement would necessarily be a trivial offense. Moreover, it is extremely doubtful whether the problem will ever arise under Article 3(a). Breaches of military discipline like unauthorized absence are offenses most likely to be discovered upon commission and punished before discharge.

as the present case illustrates, discharged servicemen will be apprehended for trial by court-martial only after careful judgments that there is probable cause for exercising the narrowly-confined jurisdiction Congress conferred.

After apprehension, a person in the situation of Toth, like others subject to court-martial jurisdiction, has a number of important procedural rights —the right to preliminary investigation under Article 32 (50 U. S. C. 603), to preliminary review of the charges under Article 34 (50 U. S. C. 605), and to representation by counsel under Articles 32 and 38 (50 U. S. C. 603, 613). He has, of course, all the rights conferred by the Code to insure a fair trial and adequate review. He is treated equally with other persons charged with similar crimes committed in similar circumstances—*i.e.*, while in the armed forces. These procedures afford due process to persons in service. The procedures of a military tribunal afford due process to a citizen triable by a military tribunal under the law of war. *Ex parte Quirin*, 317 U. S. 1. They are no less constitutional as to persons who committed crimes while in service and are subject to trial by court-martial despite their discharge from service before trial.

2. There is nothing strange to American tradition or offensive to the Constitution in empowering the military authorities to act directly against a person who is subject to court-martial jurisdiction, even when the defendant is not actually in the armed services when he is brought to trial. See

Martin v. *Mott*, 12 Wheat. 19. Indeed, in *Kurtz* v. *Moffitt*, 115 U. S. 487, pointing out that in this country "the line between civil and military jurisdiction has always been maintained" (p. 500), this Court held that a peace officer or a private citizen as such lacks authority, without the order or direction of a military officer, to arrest or detain a person charged with a crime triable only by court-martial (in that case desertion). And the court noted (pp. 500-501) that the then existing removal statute (R. S. 1014), like the present Federal Rules of Criminal Procedure, had no application to courts-martial.

Congress followed the principle that courts-martial are distinct from the civil courts of the United States when it first authorized, in the 1863 statute we have discussed (*supra*, pp. 17-20), continuing court-martial jurisdiction over offenses committed in the military service. Section 2 of that Act (12 Stat. 696, 697) provided:

> * * * any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Thus, for ninety years, there has been a continuing pattern of direct action by the military to enforce court-martial jurisdiction over discharged personnel.

Similarly, the Selective Draft Act of 1917, 40 Stat. 76, and regulations thereunder declared that persons who failed to report for induction were automatically "in the military service" and thereafter subject to court-martial jurisdiction. Under this authority, a number of persons evading the draft were apprehended by the military authorities and brought to trial by courts-martial for desertion. The validity of such action was consistently upheld. *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C.A. 2), certiorari denied, 310 U.S. 638; *United States* v. *McIntyre*, 4 F. 2d 823 (C.A. 9); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C.A. 2), certiorari denied, 262 U.S. 760; *Franke* v. *Murray*, 248 Fed. 865 (C.A. 8); see *Billings* v. *Truesdell*, 321 U.S. 542, 546-547. It can scarcely make a constitutional difference that persons apprehended and tried under the 1917 Act, though they had never worn the uniform, had been declared to be "in the military service" whereas Toth, though his alleged crime was committed "in the military service," has been discharged. The critical point in both instances is that Congress had validly conferred military jurisdiction and that it was equally valid to authorize the exercise of such jurisdiction by the military authorities.

That the determination of whether there is probable cause for the apprehension of a person subject

to court-martial jurisdiction, who is not actually in the military service at the time, is left in the first instance to the military authorities, without specific provision for judicial review, does not establish a lack of due process. Pertinent here is the observation of the court in *In re Bogart*, 3 Fed. Cas. 796, 801, the first case to consider the question of continuing court-martial jurisdiction over discharged servicemen under the Act of 1863:

> This court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositories of jurisdiction over military offenses, will abuse these powers, than that those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them.

As we have shown (*supra*, pp. 46-47), the procedure for determining probable cause in a case of this type is substantially as careful and fair as that employed by the civil authorities. The fact that the officers who employ it are in the military service—subject, of course, to the direction of the civilian Secretary whose specific consent is required for action under Article 3(a), *supra*, p. 46—is no basis for concluding that it fails to afford due process.

In short, the fact that Toth was apprehended by the military authorities and brought for trial to Korea, the place of the alleged offense, "for the proper administration of military justice" (R. 93),

in no way offends against due process. As the court below observed, it is a familiar concept of law that a man should be "answerable for a crime as of the time, place and circumstance of its commission, rather than the time, place and circumstance of his apprehension" (R. 40). A trial by court-martial is a trial under the authority of the United States. For an American trial, a preliminary hearing before the defendant is brought to the court having jurisdiction is not a matter of constitutional right. *Hughes* v. *Gault*, 271 U.S. 142, 149; *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 400. As Mr. Justice Holmes said for the Court in the *Gault* case (at 149):

> The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge. There he may deny the jurisdiction of the Court as he may deny his guilt, and the Constitution is satisfied by his right to contest it there. With immaterial exceptions any one in the United States is subject to the jurisdiction of the United States and may be required to stand trial wherever he is alleged to have committed the crime.

Even in cases of extradition from one state to another, there is no constitutional requirement that the governor of the asylum state grant a hearing to the accused before honoring a demand for extradition. *Marbles* v. *Creecy*, 215 U.S. 63, 68.

Of course, habeas corpus is available in appropriate circumstances to test the validity of extradition or removal.[19] And here we reach the heart of the answer to petitioner's claim that due process is inevitably violated because the military authorities have undertaken to remove Toth to Korea, the place of the crime, to stand trial. As the court below points out (R. 46), and as the events of this case demonstrate, "the federal courts were open to Toth, upon petition for a writ of *habeas corpus* at every instant after his apprehension"—insuring his right to due process and safeguarding against action by the military authorities in excess of their jurisdiction.

Habeas corpus is the traditional method of determining whether a person is rightfully held by the armed forces as one subject to military jurisdiction. *Billings* v. *Truesdell*, 321 U.S. 542; *Ex parte Quirin*, 317 U.S. 1; *Application of Yamashita*, 327 U.S. 1; *Eagles* v. *Samuels*, 329 U.S. 304. While, normally, review of court-martial jurisdiction is deferred until all remedies within the military system have been exhausted (*Gusik* v. *Schilder*, 340 U.S. 128), the courts can, as they have in this case, consider the transfer from civilian to military jurisdiction a sufficiently special circumstance to justify issuance of the writ before trial, to test the right of the military to take custody of a discharged

[19] On extradition, see *United States ex rel. Darcy* v. *Superintendent of County Prisons*, 111 F. 2d 409 (C.A. 3), certiorari denied, 311 U.S. 662. Removal cases are discussed in note 22, p. 54, *infra*.

serviceman in civilian status at the time of his apprehension. Cf. *Sanal* v. *Large*, 332 U.S. 174, 179-180. Thus, in *Billings* v. *Truesdell*, 321 U.S. 542, habeas corpus was the means by which a person held for trial by court-martial obtained his release on the ground that he was not subject to military jurisdiction. And see *Ex parte Qui* . . ., *supra*.[20]

In the civil courts of the federal system, a warrant of removal to a distant place is issued "upon the production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment." Rule 40(b)(3), F. R. Crim. P. Toth's removal upon sworn charges, following scrutiny by the Secretary of the Air Force, is

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[20] The Government conceded jurisdiction in this case (R. 21) although Toth had been transferred to Korea when the writ was sought. There is no question that Toth could have sought habeas corpus when he was apprehended in Pittsburgh or at any time until he was flown to Korea. The case is thus different from one where a person has never had a cause of action which was clearly within the jurisdiction of a district court of the United States, as, for example, an American citizen apprehended outside the territorial or maritime jurisdiction of the United States by authority of the United States. The question of jurisdiction presented by the latter situation has not been decided by this Court although there is an intimation in *Johnson* v. *Eisentrager*, 339 U.S. 763, 790, that an American citizen in such a position ought to have "standing to invoke the process of federal courts somewhere." The situation presented here is substantially like that in *Burns* v. *Wilson*, 346 U.S. 137, where the petitioners were convicted by court-martial in Guam, within the jurisdiction of a federal district court, and subsequently, after transfer to Japan for convenience of the Government, commenced habeas corpus proceedings in the United States District Court for the District of Columbia. The Government did not contest jurisdiction and this Court considered and decided the issues presented by the petition.

by no means a strikingly dissimilar procedure.[21] Safeguarded ultimately by the availability of habeas corpus, the procedure thus meets fully the standards of fairness prescribed by due process. And there is no need to consider now the entire scope of the issues which might be open on a petition for habeas corpus brought to test the exercise of military jurisdiction under Article 3(a).[22] (Cf. note 21, *supra*.) It is enough for present purposes that the remedy is available and that petitioner, who has employed it, raises no specific claim that Toth has been treated unfairly, but only assails the root and branch of military jurisdiction as presenting, by its very existence, a violation of the Constitution. It is sufficient answer to reiterate that Congress had power to create such jurisdiction, that the procedures for its exercise are fair

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[21] There is no problem of identity in this case. It may be assumed, however, that such an issue would be among those open in the habeas corpus court, being simply one form of the question whether the civilian apprehended was subject to military jurisdiction. Cf. *Billings* v. *Truesdell*, *supra*.

[22] Reverting to the analogy of removal proceedings in the civil courts (see *Sunal* v. *Large*, 332 U.S. 174, 179, n. 13), it has been held there that habeas corpus is available to determine whether the court to which the defendant is to be removed has jurisdiction over the offense (*Salinger* v. *Loisel*, 265 U.S. 224), although jurisdiction will not be decided if the issue involves complex facts or seriously controverted questions of law (*Rodman* v. *Pothier*, 264 U.S. 399). The courts have also examined the question of whether removal violates a constitutional right (*Haas* v. *Henkel*, 216 U.S. 462) and whether there is an entire lack of evidence to support the charge (*Tinsley* v. *Treat*, 205 U.S. 20; but cf. *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 401).

ones, and that the civil courts are open to enforce the Constitution's guarantee of due process.

We add a word, finally, regarding the dire consequences petitioner foresees from affirmance of the decision below. The forebodings are unwarranted. The subject of civilian supremacy over the military is one on which the Congress has been uniformly alert. We have sufficiently emphasized that, as the bare language of Article 3(a) makes clear, it applies to the extremely narrow area of crimes over which the civil courts lack jurisdiction. The provision has been ringed around by careful administrative safeguards against irresponsible employment even in the exceptional cases it covers. It leaves intact the statute of limitations and the other procedural guarantees with which Congress was mainly concerned when it enacted the new Uniform Code. In nearly four years of operation, it has been involved on a total of two occasions—in this and one other case where the accused tested by habeas corpus the propriety of the assertion of jurisdiction over him.[23]

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[23] *Rubenstein* v. *Wilson*, 212 F. 2d 631 (C.A. D.C.). Though the only issue considered in the opinion was whether Rubenstein had been, at the time of the offense ("the relevant period," p. 632), a person "accompanying" the armed forces within Article 2(11) of the Uniform Code, it was undisputed that this status had ended before his apprehension. Thus, when the issue of accompaniment was finally resolved against him (*Matter of Rubenstein*, D.D.C., August 27, 1954, No. 104-53), jurisdiction rested on Article 3(a) and had ac-

Judged by the actual facts of the problem, the picture petitioner paints of secret arrests, of unbridled military power, and of millions of veterans set adrift on seas of insecurity does not square with any discernible realities. It may not be amiss to recall again that the "basic guarantees" of due process "have long been recognized and honored by the military courts as well as the civil courts." *Burns* v. *Wilson*, 346 U.S. 137, 142-143. Military requirements are at their best unpleasant—for the soldier sent to Korea to fight as well as the recently discharged airman sent there to stand trial by an American court-martial for a murder he is alleged to have committed while he served there. The problems are not solved in either case by judging the powers of Congress against a presumption that the military jurisdiction it confers will be exercised without regard to individual rights.

In simple and literally apt terms that reflect Everyman's deepest "sense of injustice,"[24] Congress has judged that members of the armed forces must not be permitted to "get away with murder."

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cordingly been exercised only upon consent of the Secretary of the Air Force.

Court-martial jurisdiction over discharged servicemen under the 1863 statute (*supra*, p. 17) was similarly exercised very infrequently. See *Winthrop*, *op. cit. supra*, pp. 92, 710. From 1917 to the effective date of the Uniform Code in 1951, the Army and Air Force had a total of nine cases of this type, including four referred to earlier which were heard in habeas corpus proceedings (*Joly*, *Terry*, *Marino*, and *Kronberg*, cited *supra*, p. 18).

[24] Cf. Cahn, *The Sense of Injustice* (N.Y.U. Press, 1949).

The judgment is a sound one. The Constitution plainly permits the means by which it has been implemented.[25]

[25] We note the suggestion (Pet. Br. 21) that Congress could have authorized trial of crimes like the one in this case by the civil courts, for which petitioner cites Myers and Kaplan, *Crime without Punishment*, 33 Geo. L. J. 303, 327 (1947). Actually, however, those authors on the preceding page also suggest the alternative Congress ultimately chose, concluding that it "would not controvert any doctrine enunicated by our Constitution." The wisdom of the choice may be arguable; as we have noted (*supra*, p. 23), the Judge Advocate General of the Army stated vigorously his preference for assigning the problem to the civilian courts. But if we are correct in our view that the decision Congress made, after weighing the alternatives, is constitutional, there is no occasion here to reevaluate the choice. See pp. 23-24, 28-30, *supra*. It is sufficient to add that there is much to be said for conferring jurisdiction on the military courts where (1) the offenses are by military personnel subject to military law, (2) discovery and investigation are accomplished by military personnel, and (3) the place of the offense and the witnesses is likely to be somewhere overseas—all of which is true in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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JANUARY 1955.

APPENDIX

1. The pertinent provisions of the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, sec. 1, 64 Stat. 107, are as follows:

Article 3 (50 U.S.C. 553).

Jurisdiction to try certain personnel.

(a) Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Article 5 (50 U.S.C. 555).

Territorial applicability of the code.

This code shall be applicable in all places.

Article 7 (50 U.S.C. 561).

Apprehension.

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial thereunder may do so upon reasonable belief

that an offense has been committed and that the person apprehended committed it.

* * * * *

Article 9 (50 U.S.C. 563).

Imposition of restraint.

(a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

* * * * *

(c) An officer, a warrant officer, or a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

Article 32 (50 U.S.C. 603).

Investigation.

(a) No charge or specification shall be referred to a general court-martial for trial un-

til a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at such investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

* * * * *

Article 34 (50 U.S.C. 605).

Advice of staff judge advocate and reference for trial.

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.

* * * * *

2. The Manual for Courts-Martial, United States, 1951 (promulgated by Executive Order No. 10214, dated February 8, 1951, 16 F.R. 1303-1469), provides in pertinent part:

Paragraph 11. *Termination of Jurisdiction.*—a. General Rule.—The general rule is that court-martial jurisdiction over officers, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the military service or return into such status.

b. Exceptions.—To this general rule there

are, however, some exceptions which include the following:

Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in a status in which he was subject to the code and for which he cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia is not terminated by discharge or other termination of such status (Art. 3a). Jurisdiction under Article 3a should not be exercised without the consent of the Secretary of the Department concerned.

* * * * *

Paragraph 19, *Apprehension.*—a. Who may apprehend.—All officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties, air police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties, are authorized to apprehend, if necessary, persons subject to the code or subject to trial thereunder upon reasonable belief that an offense has been committed and that the person apprehended committed it. See Article 7b.

* * * * *

c. Procedural steps to apprehend.—An apprehension is effected by clearly notifying the person to be apprehended that he is thereby taken into custody. The order of apprehension may be either oral or written.

d. Securing custody of alleged offender.—There is a clear distinction between the authority to apprehend and the authority to arrest or confine. Any person empowered to apprehend an offender is authorized to secure the custody of an alleged offender until proper authority may be notified, the limitations (21*a*; Art. 9) on the power to arrest or confine notwithstanding.

* * * * *

Paragraph 21. *Arrest and Confinement.*—a. Who may arrest or confine.—Persons subject to the provisions of the code or to trial thereunder may be ordered into arrest or confinement as follows:

(1) *Officer, warrant officer, or civilian.*—Only a commanding officer to whose authority the individual is subject may order an officer, warrant officer, or civilian into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or by another officer (Art. 9*c*). The authority to order such persons into arrest or confinement may not be delegated (Art. 9*c*).

For this particular purpose, the term "commanding officer" shall be construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to appoint a summary court-martial.

3. Rule 40 [F. R. Crim. P.]. Commitment to Another District; Removal.

* * * * *

(b) Arrest in Distant District

(1) Appearance before Commissioner or Judge. If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) Statement by Commissioner or Judge. The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel and of his right to have a hearing or to waive a hearing by signing a

waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) Hearing; Warrant of Removal or Discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prose-

cution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 3

UNITED STATES OF AMERICA, EX. REL. AUDREY M. TOTH, PETITIONER

v.

DONALD A. QUARLES, SECRETARY OF THE UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

During the oral reargument of this case questions arose as to whether Congress, having undertaken to subject persons like Toth to trial by court-martial for offenses of the type involved here, had adequately provided in Article 9 (50 U. S. C. 563) for the "arrest or confinement" of such persons. The difficulty centered specifically on the language of Article 9 (c) providing that "[a]n officer, a warrant officer, or a civilian subject to this code *or to trial thereunder* may be ordered into arrest or confinement *only by a commanding officer to whose authority he is subject*" (emphasis added). At the request of Mr. Justice Reed, this memorandum is submitted

to clarify this point. We invite the Court's attention to our discussion of the problem at pp. 40–44 of the Government's original brief. Here, we expand that discussion in an effort to erase petitioner's suggestion (Pet. Br. 42) that Congress legislated in a "confounding or abortive manner"—that, though it clearly attempted to supply the procedures implementing the jurisdiction conferred by Article 3 (a), it slipped and failed to do so in the language of Article 9 written specifically for this purpose.

I

ARTICLE 3 (A) SUBJECTS PERSONS LIKE TOTH TO MILITARY JURISDICTION FOR TRIAL BY COURT-MARTIAL

This is a preliminary point, basic to what follows. In his brief (p. 38), counsel for petitioner expressly conceded "that the purpose of Article 3 (a) is to permit trial by court-martial of discharged servicemen." There has been some suggestion, however, playing about the word "amenability" in Article 3 (a), that Congress failed even to accomplish this purpose. It is important at the outset of this memorandum to dispel this suggestion.

Article 3 (a) of the Uniform Code of Military Justice[1] provides:

[1] While it not within the purpose for which this memorandum was requested, we note merely in passing that it is a Uniform Code of Military *Justice* with which we deal in this case. Everybody knows, though petitioner denied it in argument, that the Code was passed by a Congress bent,

(Footnote 1 continued)
not on hardening military discipline, but on insuring to the fullest extent possible the uniform and fair administration of *justice* for those subject to the Code. Thus, Professor Morgan, head of the Committee whose labors substantially produced the Code, observed that the objective was to make certain "that justice can be done to the accused" as well as "that there be no disparities between the services." *Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st Sess., on H. R. 2498*, p. 600. For a similar observation of Secretary Forrestal, see *id.*, at 598. And the civilian Court of Military Appeals created by the Code noted, in the first volume of its reports, its recognition that Congress guaranteed a pattern of rights in the Code "similar to that developed in federal civilian cases." *United States* v. *Clay*, 1 CMR 74, 77. Spelling out this thought, that tribunal went on to review some of this Court's landmark decisions on procedural due process to mark the direction of its intended approach. See *id.* at 78–80. And the subsequent years have given concrete testimony in case after case that the Congressional purpose to insure American standards of justice under the Code is to be scrupulously heeded. To cite only random and quickly discovered examples, the Boards of Review and Court of Military Appeals have enforced with rigor prohibitions against unreasonable searches and seizures (*e. g., United States* v. *Thomas*, 4 CMR 729; *United States* v. *Guest*, 11 CMR 758), against infringements of the very extensive rights under the Code to the effective assistance of qualified counsel (*e. g., United States* v. *Sizemore*, 10 CMR 70; *United States* v. *Lam*, 17 CMR 697), and against confessions unlawfully procured (*e. g., United States* v. *Branch*, 10 CMR 417; *United States* v. *Josey*, 14 CMR 185, 195–196)—this latter category including confessions obtained where there was not strict compliance with the duty to warn the accused of his right under Article 31 to remain silent and that incriminating statements may be used against him (*United States* v. *Hernandez*, 16 CMR 39), a requirement which goes beyond the usual rules on this subject in civilian tribunals (*Wilson* v. *United States*, 162 U. S. 613, 623; *Powers* v. *United States*, 223 U. S. 303, 313).

> Subject to the provisions of article 43,[2] any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from *amenability to trial by courts-martial* by reason of the termination of said status. [Emphasis added.]

Congress could not have spoken more plainly to confer upon the military jurisdiction to subject persons like Toth "to trial by courts-martial * * *." It is frivolous to argue, as petitioner has apparently attempted to do, that the word "amenability" fritters Article 3 (a) away as a kind of moral, unenforceable judgment of what ought to be. "Amenable," Webster teaches, means "liable to be

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[2] Article 43 is the statute of limitations, expressly made available as a defense in a prosecution under Article 3 (a). For five offenses—desertion or absence without leave *in time of war*, aiding the enemy, mutiny, or murder—there is no limitation. Desertion and absence without leave, both matters of military record when they occur, are extremely unlikely ever to be subjects of Article 3 (a) prosecutions—*i. e.*, offenses undiscovered or not prosecuted before the defendant's discharge. Mutiny is similar in this respect. Thus, of the five, only murder and aiding the enemy are liable to be involved in such cases. And as to murder, with which we are concerned here, it is of course almost universally the rule that there are no limitations on the time for prosecution. See, *e. g.*, 18 U. S. C. 3281.

brought to account or judgment; answerable." Squarely within the opening language of Article 3 (a), Toth is a "person charged" with an offense of the kind the Article describes, committed while he was an airman—*i. e.*, "in a status in which he was subject to this code * * *." While in that status, he was "amenable" to trial by court-martial. Article 3 (a) declares unambiguously that his discharge—"the termination of said status"—is not to relieve him from such "amenability."

Further discussion could make the statutory meaning no clearer than it is rendered by the plain language Congress chose.[3] Leaving aside the important question of constitutional power, which is not a subject of this narrow memorandum, there is no doubt that Article 3 (a) extends court-martial jurisdiction over persons like Toth.

II

ARTICLES 7 AND 9, SPECIFICALLY TAILORED TO IMPLEMENT ARTICLE 3 (a), AUTHORIZE APPREHENSION AND ARREST OR CONFINEMENT OF PERSONS SUBJECT TO THE JURISDICTION OF COURTS-MARTIAL UNDER ARTICLE 3 (a)

Articles 7 and 9 deal with the apprehension (taking into custody) and arrest (moral restraint) or confinement (physical restraint) of

[3] In our main brief (pp. 20–24), we sketch the legislative history which points with equal clarity to the conclusion that persons like Toth were intended to be subject to court-martial jurisdiction under Article 3 (a).

persons subject to military jurisdiction. For most such persons, military jurisdiction extends to matters like assigning their duties, controlling their movements, and regulating their daily conduct in accordance with the Uniform Code of Military Justice, because they are in a "status in which [they are] subject to this code." For the narrow class of persons like Toth, who are no longer "subject to this code" for their conduct today, the jurisdiction exists only because they remain, for offenses while they were in service, amenable "to trial thereunder" (Articles 7 and 9)—*i. e.*, under the code. Congress tailored the pertinent provisions of Articles 7 and 9 to deal precisely with both classes. Here we undertake to explicate the meaning of these provisions and their exact application to Toth. We shall show how the military jurisdiction conferred in Article 3 (a) is clearly effectuated by the authority to apprehend in Article 7 and the authority to arrest or confine in Article 9. We shall demonstrate how the authority created by Article 3 (a), like all military authority (however broad or narrow), is exercised by commanding officers and others acting under orders. And we shall show that Congress spoke meaningfully and with clarity when it referred, for persons like Toth as well as other classes specified in Article 9, to "a commanding officer to whose authority he is subject * * *." For Toth and those like him, the

"authority" is the accompaniment of the jurisdiction conferred by Article 3 (a), and, as the record shows, was reposed in an appropriate commanding officer *by orders*. This is how all military authority is given to commanding officers. And it makes no difference that, for purposes other than those of Articles 3 (a), 7, and 9, Toth had no "commanding officer" who could assign his daily duties, etc.

1. To outline the procedures in their order, we start with apprehension, under Article 7, which presents no basis for the "*casus omissus*" petitioner has undertaken to carve through the phrase "commanding officer" in Article 9 (c). "Apprehension is the taking into custody of a person"—Article 7 (a)—the civilian counterpart of which is commonly described as "arrest."[4] Article 7 (b) provides:

> Any person authorized under regulations governing the armed forces to apprehend persons subject to this code *or to trial thereunder* may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. [Emphasis added.]

As was pointed out on the oral argument, the words we have italicized—"or to trial thereunder"—were added to the bill which became the Uniform Code after the inclusion of Article 3

[4] See our original brief, p. 42, fn. 16.

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(a).[5] The plain purpose of the addition was, of course, to cover precisely persons like Toth who, though not "subject to this code" for offenses at the time of their apprehension are "subject * * * to trial thereunder" by virtue of Article 3 (a).

The effectiveness of this apprehension provision appeared to present no problem at the argument and need not be labored here. It may be helpful, however, to trace the steps in its application to Toth. Like the rest of the Code, and like previous military codes for many years past, Article 3 (a) is implemented and restricted by Presidential regulations in the Manual for Courts-Martial (1951). See Article 36 of the Uniform Code of Military Justice. Safeguarding the power conferred by Article 3 (a), paragraph 11b of the Manual permits the exercise of this power only with "the consent of the Secretary of the Department concerned." And so in

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[5] The original bill which became the Uniform Code did not contain the provision under which Toth is being prosecuted. During the House Hearings, this Court's decision in *Hirshberg* v. *Cooke*, 336 U. S. 210, was considered, and the provision here in issue was written to fill the gap that case disclosed. See our main brief, pp. 20–24. The Senate Committee accepted this change, and also added to Articles 7 and 9 the words "or to trial thereunder," which first appear in H. R. 4080 as reported by this Committee, and which cover specifically apprehension and arrest or confinement in cases of this type. Compare *Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, on S. 857 and H. R. 4080, 81st Cong., 1st sess.*, pp. 3, 4, with S. Rep. No. 486, 81st Cong., 1st sess., pp. 5, 8.

this case, after investigation of the charges against Toth (R. 19; see also R. 54–55, 57),* the Acting Secretary of the Air Force, satisfied that there was probable cause to believe Toth guilty of the alleged murder, ordered the Air Provost Marshal to apprehend and deliver Toth to the Commanding General, Fifth Air Force (R. 19–20). This same order, directed to the Fifth Air Force Commanding General through the Provost Marshal (R. 19), authorized the former to proceed with the court-martial charges (R. 20). The order for apprehension was duly passed through appropriate military channels (beginning with the Provost Marshal) and executed by officers and enlisted men assigned to this duty (R. 75–76, 77, 78).

We arrive, then, at this point. The statutory power to try Toth by court-martial (Article 3 (a)), and to take him into custody for this purpose (Article 7), is clear and has been duly exercised in this case. Does the whole edifice fall, as he claims, for want of further authority to confine him for trial? This involves Article 9, which, we think, answers beyond doubt the suggestion that Congress failed at this last point to effectuate its plain purpose.

2. Article 9 provides in pertinent part:

> (a) Arrest is the restraint of a person by an order not imposed as a punishment

* Contrary to a statement of counsel for petitioner on rebuttal during the reargument.

for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

* * * * *

(c) An officer, a warrant officer, or a civilian subject to this code *or to trial thereunder* may be ordered into arrest or confinement *only by a commanding officer to whose authority he is subject,* by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. [Emphasis added.]

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

As in Article 7, the words "or to trial thereunder" were added to deal with persons like Toth—a civilian not "subject to this code" but "subject * * * to trial thereunder."

It is claimed, however, that this pointed effort fails because, for such persons, there is no "commanding officer to whose authority" they are subject. The invented *casus omissus* disappears upon analysis. To be sure, Toth and others in his class have no "commanding officer" to whose authority they are subject in the sense that, *apart from the court-martial power,* their daily comings and goings are subjects of military command.

But there is, nevertheless, military "authority" (jurisdiction) over such persons for the purposes and under the grant of Article 3 (a). Like all military authority, this authority is distributed to appropriate "commanding officers" by orders within the military establishment. This may be illustrated by considering first how a commanding officer comes to have authority over anybody at all and then how the pattern applies similarly to persons who, like Toth, are subject to military jurisdiction only for court-martial purposes.

Consider Lt. Jones or Mr. Smith, a civilian accompanying the armed forces outside the continental limits of the United States.[7] Lt. Jones is assigned to X Battalion and is under the command of the battalion commander, Lt. Col. Brown. Mr. Smith serves under the same "commanding officer." Both are subject to very extensive regulation by Lt. Col. Brown, who is their commanding officer. But no statute says this in terms. No regulation specifically makes Lt. Col. Brown their commanding officer. They are in his command, and he is their commander, by virtue of orders distributing military authority and responsibility. The reason his control over them is extensive is that military authority over persons in their situation is extensive. And appropriate orders delegating that extensive authority confide it in Lt. Col. Brown.

[7] Such a civilian is subject to court-martial jurisdiction under Article 2 (11) of the Uniform Code.

With respect to Toth, on the other hand, there is also military authority—much more limited it is true, but equally real and equally assignable to appropriate commanders. *The authority over him is the power to try him by court-martial, and to apprehend and confine him for that purpose.* Like most other powers in the national military establishment, this authority is assigned to and executed by appropriate commanders. No statute or regulation expressly names Toth's "commanding officer" for this purpose any more than it names the commanding officer of Lt. Jones or Mr. Smith—or of a deserter whose unit has been deactivated but who remains subject to apprehension and arrest or confinement for trial by court-martial. In each instance, nevertheless, the power of the military exists by act of Congress and is delegated by orders to appropriate commanders.

So Congress did no vain thing when, in addition to providing for arrest or confinement of civilians "subject to this code," it aimed squarely at persons like Toth by adding civilians "subject * * * to trial thereunder * * *." With all civilians, as with officers and warrant officers, Congress restricted the power of arrest[8] and con-

[8] For clarity, we note again that "arrest" in Article 9 means "restraint" (and "confinement" means "physical restraint") while the "apprehension" provided for in Article 7 is the "taking into custody" usually described as "arrest" in civilian terminology.

finement to "*a* commanding officer to whose authority" such persons are subject. The contention that for Toth's specifically designated class there can never be any such commanding officer strains unsuccessfully to nullify the statute. The answer, to repeat it for emphasis, is that Article 3 (a) confers military authority over Toth; that this authority, like any other, is distributed through the chain of command; and that any commanding officer duly assigned authority over Toth for the purposes of court-martial under Article 3 (a) is "a commanding officer to whose authority he [Toth] is subject * * *."

Before touching upon the details of the application of this authority in Toth's case, we mention one other point about which questions were raised during argument. The second sentence of Article 9 (c) provides: "The authority to order such persons into arrest or confinement may not be delegated." Obviously this does not mean that the general of an army must order the arrest of any officer or civilian subject to his authority. There is in the military a hierarchy of commands. Depending on how particular areas of military jurisdiction are distributed, a given individual frequently has more than one "commanding officer to whose authority he is subject"—in the Air Force, for example, a wing, group, or squadron commander. Thus the commanding officer to whose authority a civilian "subject to this code"

is answerable depends on the individual or individuals to whom this portion of the military power has been assigned. Similarly with Toth, or persons like him "subject * * * to trial" under the Code, the determination of which "commanding officer" is one to whose authority he is subject is made by examining the orders assigning this head of military jurisdiction. The prohibition against delegation of authority *to order* (as distinguished from executing the order) arrest or confinement of officers or civilians simply insures that this authority will never be exercised by anyone less than a "commanding officer"—so that, for example, an officer without command authority or a first sergeant may never be given the power to order such arrests.

As we have noted (*supra*, p. 9), the order of the Acting Secretary authorized the Commanding General, Fifth Air Force, to exercise the court-martial power over Toth. We have also pointed out that Toth's *apprehension* conformed to Article 7. And so the order of the Commanding General, Fifth Air Force, confining Toth when he was delivered to Korea was unquestionably valid under Article 9 (c) of the Code.[9]

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[9] The order of confinement is not in the record (but see R. 9), since it has never been, and is not now, disputed that the Fifth Air Force Commanding General duly made such an order once Toth was delivered into his authority. The contention here, as below, is simply that there could not be an officer anywhere who could order Toth's confinement.

While, in military usage under the Code, Toth's "confinement" under Article 9 began after his arrival in Korea, with the restraint theretofore being part of the precedent process of apprehension and delivery, it would make no difference in this case if the earlier period from his apprehension to delivery in Korea were also viewed as "confinement." For, as we have observed, each step in the procedure, beginning with the Acting Secretary's order, was under the direction of an appropriate "commanding officer" (R. 68, 75–76, 77, 78).[10]

Nevertheless, we note, on advice from the Air Force, that, although Article 9 (c) makes an oral as well as a written order sufficient for confinement, Toth's confinement in Korea was in fact directed in writing by the Commanding General.

[10] As petitioner points out (Pet. Br. 42), paragraph 19d of the Manual for Courts-Martial provides that a "person empowered to apprehend an offender is authorized to secure the custody of an alleged offender until proper authority may be notified * * *." So, for example, if an officer stationed at Fort Meade, Maryland, is absent without leave in California, those apprehending him would notify Fort Meade's Commanding General, who would normally order his delivery, frequently under guard, to Fort Meade for trial. The procedure is the same where trial is to be at some point overseas, for the Code is "applicable in all places." Article 5. Cf. *Hironimus* v. *Durant*, 168 F. 2d 288 (C. A. 4), certiorari denied, 335 U. S. 818. And it applies equally to civilians "subject to this code or to trial thereunder * * *." Cf. *United States ex rel. Mobley* v. *Handy*, 176 F, 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904. The procedure is identical here except that, as frequently happens, the duty to apprehend and deliver to proper authority was detailed in advance by the order of the Acting Secretary (R. 19–20).

Moreover, as we have observed (note 9, *supra*), the issue here, as presented by the petition for certiorari and the argument on the merits, is purely the legal one whether the whole effort in Articles 3 (a), 7, and 9 founders on the "commanding officer" phrase, not the factual question of how confinement was actually effected. Our discussion of the facts has been designed merely to flesh out the analysis of military authority in operation as it is governed by the pertinent Code provisions. The whole, we believe, amply demonstrates that Congress knew what it was about,

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Moreover, while "confinement" of Toth in the usual sense of Article 9 began upon his delivery to Korea, we have already pointed out that his case would be no better if the "holding in custody" and delivery prior thereto were viewed as confinement. Petitioner's brief errs in the suggestion (p. 39) that the Acting Secretary could not qualify as a "commanding officer" under Article 9 (c) because he is a civilian. Actually, the Secretary is certainly described in the provision of the Manual (par. 21a (1)) petitioner quotes on this point (Pet. Br. 39, fn. 8) as an "officer * * * in charge of any * * * command who, under Article 24, has power to appoint a summary court-martial." The Secretary, listed only second to the President in the list of those empowered under Article 22 to appoint *general* courts-martial, is thus authorized by Article 24 (a) (1) to appoint a summary court-martial. (Article 24 (a) (1) gives this power to "any person who may convene a general or special court-martial * * *.") And the Secretary's command is, of course, the entire Air Force. 5 U. S. C. 626. It would come as a stunning surprise to those in the Air Force to learn that a lieutenant commanding an "auxiliary airfield" has a power to order arrest or confinement which is denied to the Secretary. Petitioner's suggestion that this is so is absurd.

and that the important issues of constitutional power in this case cannot be escaped by petitioner's insistence on reading only futility in the clear, orderly, and perfectly apt terms through which Congress expressed its purpose.

Respectfully submitted.

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